Supreme Court, U.S.
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No. _____

In The Supreme Court of the United States

ALISTAIR J. MacPHAIL,

Petitioner,

v.

OCEANEERING INTERNATIONAL, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

JOSEPH W. WALKER
Lead Counsel of Record
THOMAS J. MOSELE
FRANKLIN, MOSELE & WALKER, P.C.
4200 Westheimer, Suite 130
Houston, Texas 77027
(713) 840-7395
(713) 840-7448 [Fax]

GARY J. SILLER
CHRISTINE Z. CARBO
STRASBURGER & PRICE, L.L.P.
1301 McKinney, Suite 3200
Houston, Texas 77010-3033
(713) 951-5600
(713) 951-5660 [Fax]

THOMAS R. EDWARDS
BOB F. WRIGHT
DOMENGEAUX, WRIGHT, ROY & EDWARDS, P.C.
556 Jefferson Street
Jefferson Towers, Suite 500
Post Office Box 3668
Lafayette, Louisiana 70502-3668
(337) 233-3033
(337) 232-8213 [Fax]

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether the decision of the United States Court of Appeals for the Fifth Circuit has created a precedent through its application of a forum selection clause that will undermine the jurisdictional authority of federal courts and extinguish the traditional protections afforded to injured mariners.

PARTIES TO THE PROCEEDING

Petitioner:

Alistair J. MacPhail, a person of the full age of majority, who is a resident of Australia, a natural born citizen of England and a citizen of New Zealand.

Respondent:

Oceaneering International, Inc. is a publically traded corporation, incorporated in Delaware and headquartered in Houston, Texas.

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OPINIONS BELOW

This Jones Act/General Maritime Law complaint was originally filed by Plaintiff/Applicant in the United States District Court for the Southern District of Texas, Galveston Division, under G-01-266 invoking the Court's admiralty jurisdiction and claiming seaman status under 46 U.S.C. § 688. This case was brought before the Honorable Samuel B. Kent, United States District Court.

Defendant filed a Motion to Dismiss invoking a Forum Selection Clause in a seaman's Release.

On October 17, 2001, the District Court issued an Order Denying Defendant's Motion to Dismiss.[1]

On January 9, 2002, Defendant filed a Writ of Summons in the Supreme Court of Western Australia seeking to enforce specific performance of the Release.

On January 28, 2002 Plaintiff/Applicant filed a Motion to Enjoin Defendant from prosecuting the Australian proceeding in his admiralty suit in the Southern District of Texas.

Defendant filed a Motion in Opposition and asked the District Court to reconsider its previous Order Denying Oceaneering's Motion to Dismiss.

On February 11, 2002, the District Court issued an Order Granting Plaintiff/Applicant's Motion to Enjoin

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[1] App. 14-30, published as *MacPhail v. Oceaneering International, Inc.*, 170 F. Supp. 2d 718 (S.D. Texas 2001).

and Denying Oceaneering's Motion for Reconsideration.[2]

On February 25, 2002, Defendant filed a Notice of Appeal to the United States Court of Appeals for the Fifth Circuit from the Order Denying the Motion to Dismiss and from the Order Granting Plaintiff/Applicant's Motion to Enjoin and Denying Defendant's Motion for Reconsideration of its Motion to Dismiss.

On August 7, 2002, the Fifth Circuit vacated the District Court's Order Granting MacPhail's Motion to Enjoin, remanded the case to the District Court and stayed the District Court's proceedings pending judgement by the Australian Courts.[3]

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered judgement on August 7, 2002. This Petition for Writ of Certiorari is filed within the prescribed period of 90 days.

The jurisdiction of this Honorable Court is invoked under the provisions of 28 U.S.C. § 1254(1) and 28 U.S.C. § 2106.

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[2] App. 7-13, published as *MacPhail v. Oceaneering International, Inc.*, 186 F. Supp. 2d 704 (S.D. Texas 2002).

[3] App. 30-38, published as *MacPhail v. Oceaneering International, Inc*, 302 F.3d 274 (5th Cir. 2002).

STATUTORY AND REGULATORY PROVISIONS

This case involves 46 U.S.C. § 688 (the Jones Act).

STATEMENT OF THE CASE

THE FACTS

Alister MacPhail, a 41 year old saturation diver, was continuously poisoned by toxic chemicals while diving for Oceaneering International, Inc. (Oceaneering).[4] His injuries include, but are not limited to, brain damage, nerve damage, lung damage, and liver damage.

On May 18, 1998, in the navigable waters of the China Sea, MacPhail exited onto the sea floor from his diving bell while working for Oceaneering.[5] Saturation diving is similar to being in space in that once a diver is pressurized, he will live under pressure during the course of the project.

While on the sea bed, he suffered from severe headaches, loss of concentration, and co-ordination. He had never before experienced such problems. On returning to the bell, he felt disoriented. Inside the bell, the hoses and internal surfaces of the bell were covered in an oily and muddy sludge. He experienced headaches and severe vomiting. The surface management was informed.

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[4] Oceaneering's corporate headquarters are located in Houston, Texas.

[5] App. 18-22, [*MacPhail v. Oceaneering International, Inc.*, 170 F. Supp. 2d at 722, 723, 724] contains a comprehensive summary of the facts as recited by the District Court.

He continued living under pressure for approximately thirty days and encountered similar problems during the course of other excursions from the diving bell. During this time MacPhail and the other three companion divers continued to report problems with headaches, nausea, loss of dental fillings and gritty material in the breathing system.

Oceaneering was informed by fax that the collected mud sample from the bell guide weight was in the consistency of jelled drill mud, dark gray to black in color, and emitted a heavy, eye-watering odor of rotten eggs or sulphur. They were further informed that the metal rigging and chain hoist came back to the surface stripped of paint and rust, as if they had been immersed in an acid bath.

Test results from the mud samples were sent to Oceaneering and identified as a cocktail of toxins, including hydrogen sulfide, cyanide, arsenic, mercury, and polychlorinated biphenals. Despite this fact, MacPhail's saturation dive was not terminated nor was he informed by Oceaneering that his exposure to these chemicals was potentially lethal.

In any event, once topside, MacPhail's medical treatment was put in the hands of Oceaneering's Houston headquarters with monitoring by a group of lawyers in Australia. Cocks Macnish was (supposedly) appointed by Oceaneering to "liaise" with MacPhail regarding his medical care. Oceaneering assured him that Cocks Macnish was not adversarial but appointed to allocate resources and to try and find the best medical help.

Arsenic was found in MacPhail's urine and blood samples and Oceaneering's company doctor concluded that

MacPhail had liver damage and impaired renal failure. However, the complete list of chemicals was never sent to this doctor.

With the downhill spiral already underway, even after belated requests, he was never sent to a toxicologist or hyberbaric specialist. While Oceaneering promised to get the proper medical treatment, including providing experts and specialists in hyberbarics and toxicology, this never occurred. Oceaneering failed to contact medical experts it had on call. Oceaneering simply sat on this information, and continued to blatantly mislead MacPhail as to the existence of these medical experts.[6] MacPhail's condition progressively worsened and when he continued to request medical help, Patricia Saraceni (with Cocks MacNish), advised that Oceaneering could not continue to help him and that the situation could not go on indefinitely. Using financial coercion, Oceaneering pushed settlement and threatened to cut MacPhail off from any help.

MacPhail, sick, depressed, racked by pain and unaware that he was suffering from toxic brain and spinal cord injury, entered into a settlement with Oceaneering on November 3, 1999.

The Release was prepared by Saraceni and executed in Western Australia. In consideration of the Release, MacPhail received $280,000.00, a commitment to provide additional training and $ 25,000 to cover medical costs.

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[6] App. 69, 70 Report of Doctor Paul Harch.

The Release provided:

> "This Deed of Release and Discharge will be governed by and construed in accordance with the laws of Western Australia."

In addition, the Release included a forum selection clause:

> In the event of any dispute in respect of or arising from this Deed of Release and Discharge or any matter relating thereto the parties hereby agree to submit their dispute to the exclusive jurisdiction of the District or Supreme Court of Western Australia, or to the Federal Court of Australia and the parties hereby agree to submit to the exclusive jurisdiction of the said Courts.[7]

Prior to the execution of this Release, Patricia Saraceni, sent MacPhail a standard form letter advising him to seek counsel. However, neither Oceaneering nor Patricia Saracini made any attempts to confirm that MacPhail had obtained legal representation.[8] In fact Saracini prepared all the "letters" that MacPhail signed and drafted and filed the friendly lawsuit. There is no record of any inquiry by the Australian Courts or by any counsel representing MacPhail as to the fairness of the settlement.

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[7] App. 33.

[8] The Agreement and the court documents are noticeably void of any counsel for MacPhail. Oceaneering produced no correspondence with any counsel representing MacPhail.

MacPhail was unaware that the Australian courts had no subject matter jurisdiction over his underlying claims and that the United States was the only available forum.[9]

Almost one year later, MacPhail discovered a New Orleans medical group specializing in hyperbaric treatment. This group had previously been utilized by Oceaneering for treatment of diving emergencies and their existence was never relayed to MacPhail.[10] Dr. Paul Harch, diagnosed MacPhail with multiple physical abnormalities, including brain injury, spinal cord damage, and nerve damage, all caused by the toxic exposure and accompanying decompression sickness. Doctor Harch tragically concluded that MacPhail's short, medium and long term prognosis would have been different had he been immediately treated.[11]

Now painfully aware of his dreadful medical condition, Alister MacPhail was moved to file the underlying Jones Act lawsuit against Oceaneering in the Southern District of Texas. Oceaneering filed a Motion to Dismiss based on the forum selection clause contained in the Release signed by MacPhail.

In support of his brief and in opposition to Oceaneering's Motion, MacPhail filed *uncontested* affidavits which established the unconscionable conduct of his employer Oceaneering and its Australian attorneys to secure the

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[9] 46 U.S.C. § 688(b)(2).

[10] App. 69, 71 Report by Doctor Paul Harch.

[11] App. 71.

seaman's Release, and MacPhail's lack of mental capacity to enter into a valid agreement.

By way of example, Dr. Paul Harch outlined his brain injury as well as his cognitive problems as follows:

> . . . [MacPhail] has central nervous system damage including brain damage due to a combination of toxic brain injury and decompression sickness. The decompression sickness component, I firmly believe, is present, based on the patient's worsening symptoms, once he exited saturation. . . . [12] we know by the SPEC brain scans, the psychometric testing, the MRI, EEG's, physical findings and the sleep apnea study that the patient at this late date has brain damage. It was likely more severe at the time he signed his settlement. . . . [13]

An assessment by his psychiatrist, Dr. Phillips, clearly indicated that MacPhail could not have been competent to execute a valid seaman's Release:

> The second and more probable explanation for MacPhail's cognitive difficulties will be damage to neurons due to exposure to toxic chemicals. Numerous chemicals including heavy metals [sic] and hydrogen sulphide have potential to damage or to kill neurons. . . . [14]
>
> Mr. MacPhail almost certainly was suffering from substantive symptoms of a major depressive

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[12] App. 66.

[13] App. 71, 72.

[14] App. 76, 77.

> disorder throughout 1999 and he had cognitive dysfunction at the time (with psychometric evidence to substantiate this matter). It can be accepted that throughout 1998, Mr. MacPhail would have been hindered significantly in negotiating in an appropriate manner with his employer and in reaching a proper agreement with his employer at the time of his settlement.[15]

Thus, Mr. MacPhail's medical, physical, and psychological condition demonstrated that he lacked the capacity to enter into any settlement agreement, much less acquiesce to the forum chosen by Defendant. Oceaneering's conduct in obtaining the Release and depriving MacPhail of necessary medical treatment and information can only be described as malicious. Dr. Youngblood, in his report, concluded that:[16]

> . . . his quest for treatment was dogged by delay, obfuscation, and fraudulent misrepresentation.[17]
>
> In the absence of any significant treatment, Mr. MacPhail continued to deteriorate, and, in my opinion, was suffering from severe anxiety and depression superimposed upon organic brain damage sustained by exposure to toxins and possible central nervous system decompression sickness when he signed the Deed of Release of Discharge in a state of mental incompetence. . . .

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[15] App. 78.

[16] Dr. David Youngblood was the former Medical Director of Oceaneering. His extensive qualifications in diving medicine can be found in App. 40-46.

[17] App. 53.

> Finally, as one of the founders of Oceaneering's Safety Group, it saddens me to see the years of dedication by Diving Supervisors, Area Safety Officers, and the sometimes Medical Director sullied in this perverted scheme by an insurance company, their solicitors, and a degenerate corporate culture to fraudulently withhold information, treatment, and definitive care from divers injured while carrying out their duties under the captive conditions of saturation diving. Here, of all places, the employer stands "in loco parentis" and the failure to respond to the plea for help in this instance is the most egregious violation of trust and responsibility I have ever seen in the industry, with almost criminal neglect causing injury, only to be followed by a conspiracy to defraud the victims of care and reasonable compensation.[18]

Similarly, in his affidavit, Mike Humphries, Oceaneering's diving manager, states:

> We relied on assurances from Mr. Overland that medical experts were being contacted on a world wide basis. . . . Unfortunately, after reviewing Mr. Overland's deposition, these assurances appear to have been misleading and false. A review of Mr. Overland's deposition in addition to what I have personally observed show both lack of care and deceptive conduct by Oceaneering International, Inc.[19]

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[18] App. 53, 54.

[19] App. 81, 82.

In his sworn statement, Paul MacCallum, the manager selected by Oceaneering to pass on information from Houston to the sick divers, states:

> I would say that I feel as though I've been led up the garden path, which is another way of saying deceived. . . . The divers were definitely strung along.[20]

On October 17, 2001, after reviewing these uncontested affidavits, the District Court issued an Order denying Oceaneering's Motion to Dismiss. The District Court concluded that the forum selection clause in the Release was unreasonable and therefore unenforceable because its enforcement would 1) violate a strong public policy, 2) Plaintiff would be deprived of his day in court, and 3) its enforcement would eviscerate the fundamental notion that the rights of seaman are worthy of special protection by the Admiralty courts. The District Court further noted that the Australian Courts would dismiss this lawsuit based on lack of subject matter jurisdiction.[21] The District Court correctly reasoned that subject matter jurisdiction could not be cured by an agreement of the parties and that it would be unreasonable to decline

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[20] App. 84.

[21] App. 55-61. The uncontested affidavit of David Leask, an Australian Barrister, states that MacPhail has no tort remedy in Australia because: Oceaneering has no legal presence in Australia; the employment contract was not concluded in Australia, nor made any reference to Australian law; the injury took place outside of Australia; and there was no common intent that his employment be governed by the laws of Australia.

jurisdiction in favor of an implausible and unworkable forum.[22]

On January 9, 2002, Oceaneering filed a Writ of Summons in the Supreme Court of Western Australia seeking to enforce specific performance of the Release. The Writ commanded MacPhail to make an appearance in the Australian forum within 10 days. MacPhail, however, was scheduled to travel to the United States in mid-January for further medical treatment and independent medical examinations requested by Oceaneering. As a result, MacPhail filed a Motion to Enjoin Oceaneering from proceeding in Australia in his admiralty suit in the Southern District of Texas. In his motion, MacPhail argued that Oceaneering filed the Australian lawsuit to effectively circumscribe the Southern District of Texas' jurisdiction and to interfere with MacPhail's medical treatment. Oceaneering filed a Motion in Opposition and asked the District Court to reconsider its previous Order denying Oceaneering's Motion to Dismiss. On February 11, 2002, the District Court issued an Order Granting MacPhail's Motion to Enjoin and Denied Oceaneering's Motion for Reconsideration.[23]

The District Court emphasized that Oceaneering's law suit in Australia was duplicitous and "magnified by the fact that MacPhail was egregiously and dreadfully injured." The Court opined that Oceanneering's conduct

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[22] App. 14-29 [*MacPhail v. Oceaneering, International, Inc.*, 170 F. Supp. 2d 718 (S.D. Texas 2001)].

[23] App. 1-18 [*MacPhail v. Oceaneering International, Inc.*, 186 F. Supp. 2d 704 (S.D. Texas 2002)].

smacked of cynicism, harassment and delay and wrote that:

> . . . against the backdrop of Oceaneering's incomprehensibly deceitful and imperious withholding of not only vital medical care, but even vital medical *information,* this crass tactic borders on the criminal. Oceaneering waited *months* before it attempted to litigate the validity of the Release in Australia. . . . Such timing cannot be deemed fortuitous. Rather, it seems that Oceaneering made a calculated and cold-blooded attempt to interrupt MacPhail's journey to the United States, and deny him any opportunity whatsoever to physically recover. . . . The court cannot emphasize enough how ghastly and utterly callous Oceaneering has acted with regard to MacPhail. . . .[24]

On February 25, 2002, Defendant filed a Notice of Appeal to the Fifth Circuit from the Order Denying the Motion to Dismiss and from the Order granting Plaintiff's Motion to Enjoin and Denying Defendant's Motion for Reconsideration of its Motion to Dismiss. On August 7, 2002, the Fifth Circuit vacated the District Court's Order Granting MacPhail's Motion to Enjoin, and Stayed MacPhail's Jones Act proceedings pending judgement by the Australian Courts.[25]

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[24] App. 12 [*MacPhail* 186 F. Supp. 2d at 710, 711].

[25] App. 30-38 [*MacPhail v. Oceaneering International, Inc.,* 302 F.3d 274 (5th Cir. 2002)] Rather than dismissing the case, the Fifth Circuit's hybrid decision circumvents ruling on the Districts Court's Motion to Dismiss by staying that action in the District Court and then forcing MacPhail to set aside the Release in Australia.

MacPhail, a brain damaged seaman, who is sick, unemployable, and without the means to continue his essential medical care in the United States is now forced to litigate the validity of the Release in the Australian courts which has no subject matter jurisdiction over the underlying injury.

Once successful in Australia, MacPhail will have the onerous and duplicative task of litigating and re-presenting his evidence in the United States to obtain a proper remedy for his injuries against the Defendant whose headquarters are in Houston.

REASON FOR GRANTING THE WRIT

THE FIFTH CIRCUIT'S MISAPPLICATION OF THE FORUM SELECTION CLAUSE IGNORES THIS COURT'S GUIDELINES AND SETS A PRECEDENT THAT WILL ENABLE UNSCRUPULOUS EMPLOYERS TO STRIP SEAMEN OF THEIR RIGHTS AND WEAKEN THE TRADITIONAL POWERS OF THE FEDERAL COURTS.

This Petition of Writ is worthy of this Court's attention. This Court has yet to rule specifically concerning the enforceability of forum selection clauses in the unique context of seaman Releases.

In rendering its decision against Mr. MacPhail, the Fifth Circuit has made employers immune from any meaningful review of a forum selection clause contained in an injured seaman's Release. By giving short shrift to the detailed analysis of the District Court and ignoring the uncontested evidence filed in the record, the Fifth Circuit

has condoned the use of unscrupulous methods in securing an unfavorable Release from an injured mariner and has strangled the power of federal courts to keep such conduct in check.

Mr. MacPhail correctly argued that enforcement of his Release by way of the forum selection clause violated a strong public policy, and that its enforcement would deprive him of his day in court. The District Court agreed. The Fifth Circuit ignored this argument and without any significant analysis of the record or the law held *ipso facto* that "federal courts must presumptively uphold forum selection clauses in international transaction."[26] Thus, the situation creates a contest of a seaman's rights against those of the shipowner's with the outcome being determined by this Court's willingness to reach down and exercise its traditional protection of seaman as wards of the Admiralty.

The Fifth Circuit's decision violates the deeply entrenched public policy of this Court with respect to the protection of seamen and deprives Plaintiff of his day in court

What ultimately transpired in this case is that a brain-damaged mariner, led to believe that his interests were being protected by Oceaneering's counsel, was hoodwinked by his employer as to the nature and severity of his injuries so that he would enter into a settlement Release that would deny him access to the only available forum that had jurisdiction over his underlying injuries.

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[26] App. 37 [*MacPhail*, 302 F.3d at 277].

The Fifth Circuit's *ipso facto* holding directly contravenes the pronouncements of this Court. Analysis of forum selection clauses in maritime cases is controlled by two cases, *M/S Bremen v. Zapata Off-Shore Co.* and *Carnival Cruise Lines, Inc. v. Shute*. In both cases, this Court has held that such clauses are unenforceable if "unreasonable."[27] Enforcement may be unreasonable when:

> 1) the incorporation of the clause into the agreement was the product of fraud or overreaching; 2) the party seeking to escape enforcement will for all practical purposes be deprived of his day in court because of the grave inconvenience or unfairness of the selected forum; 3) the fundamental unfairness of the chosen law will deprive the plaintiff of a remedy; or 4) enforcement of the forum selection clause would contravene a strong public policy of the forum state.[28]

In this case, the District Court correctly found that the forum clause was unreasonable because of deeply entrenched public policy concerns and the failure of Mr. MacPhail to have both a remedy and a meaningful day in court. These factors were demonstrated by MacPhail in his Opposition to the Motion to Dismiss, accompanied by a volume of attached exhibits. The District Court appropriately held that: 1) MacPhail presented multiple affidavits suggesting fraud, coercion, and manifest overreaching by Oceaneering, 2) the clause violated strong public policy,

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[27] *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

[28] *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

and 3) that its enforcement would deprive MacPhail of both a remedy and a meaningful day in court.

In *Bremen*, this Court held that a forum selection clause in a towage contract was prima facie valid and enforceable. However, in stark contrast to this case, *Bremen* involved a fully negotiated contract by two highly sophisticated international companies, unaffected by fraud, lack of mental capacity, undue influence or overweening bargaining power.[29] In choosing to enforce the forum selection clause, this Court made nearly twenty references to the fact that the clause at issue was part of a *fully negotiated contract between sophisticated international businessmen and that the forum chosen was a neutral forum with expertise in the subject matter.*[30] However, this Court cautioned against enforcement of such clauses where allegations of fraud and undue bargaining power are present and urged that these clauses should not be enforced when they are *unreasonable* or the chosen forum is *seriously inconvenient* for the trial of the action.[31,32]

The District Court, after conducting an exhaustive in-depth examination of the affidavits and other materials submitted by both parties, agreed that "the circumstances of this lawsuit are so dire and the alleged conduct of Oceaneering so egregious, [it] must consider the clause's

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[29] *M/S Bremen*, 407 U.S. at 2, 12.

[30] *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

[31] *Id.*

[32] *Id.* at 10.

enforceability in light of the averments presented by MacPhail's affidavits."[33]

This Court has historically ensured that settlements with seamen are fair.[34] Seamen have long been recognized even by the Fifth Circuit to be wards of admiralty, and their rights are generally protected by the maritime courts.[35,36] Federal courts must look upon a seaman's

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[33] *MacPhail v. Oceaneering*, 170 F. Supp. 2d 718, 722 (S.D. Tex. 2001).

[34] *See, Garret v. McCormick*, 317 U.S. 239 (1940).

[35] *See, Castillo v. Spilidad Mar. Corp.*, 937 F.2d 240, 247 (5th Cir. 1991) in which the Court noted that seamen, as wards of the court, are entitled to a careful review when a district court refuses to exercise jurisdiction over their claims. "We are convinced that federal courts must remain vigilant in protecting the rights of seaman, whether foreign or domestic, in their relations with their employer."

[36] In *The Juliana*, 2 Dod. (1822) 504, in which Lord Stowell remarked that it would not do to say to a seaman "that it is all his own doing, and that he is thought fit to bring it upon himself by his own indiscretion in signing such a contract." "To such men," he said, in *The Minerva*, 1 Hagg. (1825), 347, "no such response can be made, as that which is irresistibly made in other cases of contract – it is your own contract, you have signed it with your eyes open * * * ." And he based the reasons for such a rejection of the usual "signed-it-with-your eyes-open" standard on "the extreme disparity between the two parties" to the contract. "On the one side are gentlemen possessed of wealth, and intent, I mean not unfairly, upon augmenting it, conversant in business, and possessing the means of calling in the aid of practical and professional knowledge. On the other side is a set of men, generally ignorant and illiterate, notoriously and proverbially reckless and improvident, ill provided with the means of obtaining useful information, and almost ready to sign any instrument that may be proposed to them; and on all accounts requiring protection, even against themselves. Everybody must see where the advantages must lie between parties standing upon such unequal ground, and accordingly these special engagements so introduced into the mariners' contract lean one way, to the disadvantage of the mariners, and to the advantage of their

(Continued on following page)

Release with heightened scrutiny and should inquire as to whether there was a good faith negotiation and whether the seaman received competent medical and legal advice or was "overreached" by the shipowner and/or its attorney or claims agent and whether there was any fraud that may have occurred. The shipowner claiming the benefit of a Release bears the burden to show that it was fully explained to the seaman and that the settlement was entered into without any coercion or fraud and that the consideration paid was sufficient to compensate him for his medical condition and injury.[37,38,39]

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employers, by increasing the duties of the former, and diminishing the obligations of the latter." *Hume v. McCormick Lines,* 121 F.3d 336 (2nd Cir. 1941), containing an excellent discussion of the history of the "wards of the admiralty court" doctrine in maritime contract law, as noted in *The Proper Role of Special Solicitude in The General Maritime Law,* 70 Tul. L. Rev. 227 (1995).

[37] *See, Chandris, Inc. v. Latsis,* 515 U.S. 347, 354-55 (1995) (tracing development of heightened legal protection given to seamen who, "by the peculiarity of their lives [are] liable to sudden sickness from change of climate, exposure to perils, and exhausting labour"); *McDermott Int'l, Inc. v. Wilander,* 498 U.S. 337, 354 (1991) (stating that "traditional seamen's remedies . . . have been 'universally recognized as . . . growing out of the status of the seaman and his peculiar relationship to the vessel, and as a feature of the maritime law compensating or offsetting the special hazards and disadvantages to which they who go down to sea in ships are subjected' ") (quoting *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 104 (1946) (Stone, C.J., dissenting)); *Wink v. Rowan Drilling Co.,* 611 F.2d 98, 100 (5th Cir. 1980) (subjecting Releases or settlements involving seamen's rights to careful scrutiny because seamen are wards of admiralty).

[38] *See, Maritime Personal Injury and Death,* 73 Tul. L. Rev. 1731 (1999) (citations omitted).

[39] *See, The Iroquois,* 194 U.S. 240 (1904). This Court almost a hundred years ago imposed a duty to provide proper medical care for an injured seaman and held that ignorance of a medical condition or

(Continued on following page)

This principle has not withered with time. This case is a textbook example of the need for the judiciary to champion the rights and protect seamen. In contrast, the Fifth Circuit's cursory decision fails to analyze and weigh the policies behind both a seaman's right and a shipowner's right to select a forum. Understanding the original role of the federal courts in the protection of seamen, coupled with the circumstances in this case, demonstrates the gravity of the Fifth Circuit's misplaced decision.

The Fifth Circuit circumvented the application of *Bremen* to this case by crafting a ruling which reverses the District Court's injunction and forces a sick and destitute mariner to courts that have no jurisdiction to hear the underlying claim, the effect of which robs the District Court of its jurisdiction and deprives MacPhail of his day in court. The U.S. District Courts for the Southern District of Texas are the only courts with proper jurisdiction over the Defendant and the District Court did not abuse its discretion in enjoining Oceaneering from pursuing any other action to protect and preserve that jurisdiction.

This Court has ruled that anti-suit injunctions are justified when necessary to prevent a litigant's evasion of the forum's important public policies.[40] This principle is

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available medical care was not a defense. In contrast to the nonfeasance of *The Iroquois,* Oceaneering's active malfeasance coupled with the Fifth Circuit's ruling returns mariners to the days when they were expendable.

[40] *Cole v. Cunningham*, 133 U.S. 107 (1890); *see, also, 1-A (Part II) J. Moore, W. Taggart, A. Vestal and J. Wicker,* Moore's Federal Practice, ¶ 204 (1982) ("a court may enjoin a party from pursuing litigation in another court which circumscribes the policy of the forum issuing the injunction)."

similar to the rule that a foreign judgment which will not be enforced within the United States when contrary to the crucial public policies of the forum in which enforcement is requested.[41] Both rules recognize that a state is not required to give effect to foreign judicial proceedings grounded on policies which do violence to its own fundamental interest.[42] When the primary purpose of the foreign action is to avoid the regulatory effect of the domestic forum's statutes or an important matter of public policy, then an injunction is more readily issued.[43]

Public policy concerns also support the District Court's decision in this case. The District Court properly recognized the long-standing public policy of affording seamen, as wards of the Admiralty Court, special protection from the hazards of life at sea; a policy "deeply entrenched" in our legal system.[44] The District Court held that MacPhail "unquestionably fell within the group of plaintiffs that our venerable and strong public policy favoring the rights of seamen was fashioned to protect," and that enforcing the forum selection clause would

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[41] *See, Hilton v. Guyot*, 159 U.S. 113 (1895).

[42] *See, Laker Airways, Ltd. v. Sabena Belgian World Airways*, 731 F.2d 909, 931 (D.C.Cir.1984).

[43] *See, Laker Airways, Ltd.*, 731 F.2d at 932 (D.C.Cir.1984). In this case, the Court held that an injunction properly prevented the appellants from attempting to escape application of the antitrust laws to their conduct of business in the United States. The Court held that the statutes were of admitted economic importance to the United States which were specifically applicable to their activities in the United States and upon which the Plaintiff may have legitimately relied.

[44] App. 26 [*MacPhail*, 170 F. Supp. 2d at 725] citing *Castillo v. Spilidad Mar. Corp.*, 937 F.2d 240 (5th Cir. 1991).

"eviscerate the fundamental notion that the rights of seamen are worthy of special protection by the admiralty courts."[45]

The District Court did not abuse its discretion in enjoining Oceaneering from pursuing another action outside of the district to enforce specific performance of the alleged settlement agreement. The Fifth Circuit's stay of the underlying claim is an acknowledgment of the claim's merits but it's reversal of the injunction allows Oceaneering to escape the jurisdiction of the District Court and obtain a judgment which it could use to terminate the instant case.[46] The result is a tremendous hardship for the Plaintiff. It will force him to defend and participate in multiple suits that span across the globe.[47] More importantly, an injunction is the only way to accomplish the goals set out by the District Court in its prior ruling; that is, to protect its rightful jurisdiction, to protect fundamental and vital public policy considerations and to afford

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[45] App. 27 [*MacPhail*, 170 F. Supp. 2d at 726].

[46] App. 30-38. The Fifth Circuit justifies its decision by implying that MacPhail filed a lawsuit in Australia against Oceaneering and that he declined to have any representation. A careful review of the documents show that every scrap of paper was prepared and filed by Oceaneering's lawyers. The conflicts are obvious and it is troubling that the Fifth Circuit is bootstrapping MacPhail with acts of legal sophistication that to any novice lawyer are lacking. Its decision is result orientated and avoids dealing with the evidence contained in the record which was uncontested by Oceaneering.

[47] The order is harsh because all of MacPhail's treating physicians, many of his expert witnesses, and Oceaneering's witnesses will all now have to travel to Australia to testify to the same facts that are at issue in the case already filed in the District Court. The economic costs alone may prevent him from litigating his claim.

MacPhail his day in court. Accordingly, the District Court's Motion to Enjoin should be affirmed.

Mr. MacPhail, as required, has made the showing that the agreement was "[affected] by fraud, undue influence, or overweening bargaining power"; that "enforcement would be unreasonable and unjust"; and that proceedings "in the contractual forum will be so gravely difficult and inconvenient that [the resisting party] will for all practical purposes be deprived of his day in court."[48]

It would be an intolerable infraction of the principles of justice and denigration of this Court's authority to allow the Fifth Circuit's opinion to stand unchallenged. To cut to the chase, a shipowner's financial interest should never override that of an injured seaman. The callous disregard of a seaman's interest whose very life may be at stake is profoundly disturbing.

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[48] *M/S Breman*, 407 U.S. at 12, 15, 18.

CONCLUSION

Petitioner respectfully submits that this Honorable Court grant a writ of certiorari and, after due proceedings, that the Judgements of the United States Circuit Court of Appeal for the Fifth Circuit be reversed and this matter be remanded for trial in the United States District Court, Southern District of Texas, Galveston Division.

JOSEPH W. WALKER
Lead Counsel of Record
THOMAS J. MOSELE
FRANKLIN, MOSELE & WALKER, P.C.
4200 Westheimer, Suite 130
Houston, Texas 77027
(713) 840-7395
(713) 840-7448 [Fax]

GARY J. SILLER
CHRISTINE Z. CARBO
STRASBURGER & PRICE, L.L.P.
1301 McKinney, Suite 3200
Houston, Texas 77010-3033
(713) 951-5600
(713)951-5660 [Fax]

THOMAS R. EDWARDS
BOB F. WRIGHT
DOMENGEAUX, WRIGHT, ROY & EDWARDS, P.C.
556 Jefferson Street
Jefferson Towers, Suite 500
Post Office Box 3668
Lafayette, Louisiana 70502-3668
(337) 233-3033
(337) 232-8213 [Fax]

Counsel for Petitioners

2002 WL 237444

United States District Court,
S.D. Texas,
Galveston Division.

Alistair J. MACPHAIL
Plaintiff,
v.
OCEANEERING INTERNATIONAL, INC.
Defendant.

No. CIV.A.G-01-266.

Feb. 11, 2002.

Joseph W Walker, Franklin Mosele & Walker, Gary J Siller, Strasburger & Price LLP, Houston, for Alistair J MacPhail, plaintiffs.

James Patrick Cooney, Royston Rayzor et al, Houston, for Oceaneering International, Inc., defendants.

ORDER GRANTING MACPHAIL'S MOTION TO ENJOIN AND DENYING OCEANEERING'S MOTION FOR RECONSIDERATION OF ITS MOTION TO DISMISS

KENT, District J.

Plaintiff Alistair MacPhail ("MacPhail") brings this lawsuit pursuant to the General Maritime Law of the United States of America, the Jones Act, 46 U.S.C. § 688, and the state laws of Texas. Plaintiff seeks monetary damages for injuries suffered in the course of his employment as a saturation diver on the dive support vessel OCEAN WINSERTOR, owned and operated by Defendant Oceaneering International, Inc. ("Oceaneering"), a large

multi-national corporation headquartered in Houston, Texas. Now before this Court is MacPhail's Motion to Enjoin Oceaneering from further pursuing an action that it recently instituted against MacPhail in Australia and Oceaneering's Motion for Reconsideration of its Motion to Dismiss. For the reasons articulated below, MacPhail's Motion to Enjoin is hereby GRANTED and Oceaneering's Motion for Reconsideration is hereby DENIED.

I.

The factual allegations giving rise to this manifestly tragic lawsuit have been largely set out in a prior Order. However, because they are intertwined with the issues sub judice, they are once again set out in full. While working for Oceaneering on May 18, 1998, MacPhail was committed under pressure to saturation diving in the China Sea.[1] Along with three diving partners, MacPhail was "stored" at a depth of approximately 100 feet with a breathing mix of helium and oxygen. During the thirty day period that MacPhail remained in saturation, he and his diving partners undertook approximately fifteen "bell runs" in which they would descend to the bottom in a diving bell, exit the bell for several hours of work and then return to the vessel to await their next run.

As MacPhail entered the diving bell for his second bell run, he observed oil, mud and sludge coating the hoses and the inside of the bell. While on the bottom during the run,

[1] Saturation diving requires a diver to spend extended periods of time under pressure before resurfacing.

MacPhail experienced severe headaches, loss of concentration and decreased coordination. Upon returning to the bell, MacPhail felt disoriented. After the bell was returned to the vessel, MacPhail experienced headaches, loss of appetite, nausea and vomiting. MacPhail promptly and specifically reported his problems to surface management and the deck crew cleaned the interior of the bell.

Throughout the entire remainder of the saturation period, MacPhail continued to experience headaches, nausea, the loss of dental fillings and other severe and immediate medical problems. Although MacPhail repeatedly reported his troubles to management, the dive was not shut down and Oceaneering sent MacPhail on numerous subsequent dives. Later analysis of the seabed showed that the mud contained toxic levels of various metals including arsenic and mercury, cyanide, hydrogen sulfide and polychlorinated biphenyls.

When MacPhail was brought to the surface after thirty days, he was weakened, disoriented and exuding a "disgusting" odor. Clearly, he was in dire need of medical attention. MacPhail was transported first from the vessel to Hong Kong, where he received one day of medical attention, and then to Singapore, for additional treatment.

Upon returning to Australia (his residence at the time), MacPhail visited additional doctors provided by Oceaneering, but his condition continued to worsen. Over the ensuing months, MacPhail suffered sleep loss, depression, pain in his teeth, episodes of intense anger, excruciating headaches, fainting spells and a host of other complications. MacPhail continued to make requests to Oceaneering for experts in hyperbaric medicine and toxicology, but was repeatedly told that Oceaneering was

either looking for or unable to locate appropriate specialists. Ultimately (and incomprehensibly), Oceaneering failed to refer MacPhail to even one specialist experienced in diving medicine, chemical poisoning, or hyperbaric medicine.

Oceaneering appointed Cocks Macnish, an Australian law firm, to liaise with MacPhail. Two Oceaneering employees, Overland and Leung, assured MacPhail that the Cocks Macnish lawyers were not adversarial but rather, were appointed to allocate resources and seek out the best medical help available. However, Patricia Saraceni, the Cocks Macnish solicitor handling the case, blithely responded to MacPhail's repeated requests for help by informing him that Oceaneering could not continue to help him and that the situation required closure. Furthermore, Overland and Leung repeatedly telephoned MacPhail, deprecating his problems and offering him a sum of money to "put it all behind us." Later, after Saraceni, Overland and Leung informed MacPhail that there was nothing more medically that could be done, and threatened to cut off future medical and financial assistance. Sick, frightened and intimidated, MacPhail agreed to sign a Deed of Release and Discharge ("Release"). MacPhail was not represented by counsel at that time.

The Release was prepared by Saraceni and executed in Western Australia on November 3, 1999. In consideration of the Release, MacPhail received $280,000.00, a commitment on the part of Oceaneering to provide MacPhail with additional training courses and an escrow fund in the amount of $25,000.00 to cover future medical expenses. The forum selection clause contained in the Release reads:

> In the event of any dispute in respect of or arising from this Deed of Release and Discharge or any matter relating thereto the parties hereby agree to submit their dispute to the exclusive jurisdiction of the District Supreme Court of Western Australia, or to the Federal Court of Australia and the parties hereby agree to submit to the exclusive jurisdiction of the said courts.

The execution of the Release was followed by the entry of a judgment in the District Court of Western Australia, Perth.

By the spring of 2000, MacPhail was a shadow of his former self. Severely depressed and in constant pain, MacPhail found himself unable to work or carry on normal relationships with others. That year, he became aware that one of his similarly situated diving partners had received helpful treatment in the United States from the Van Meter hyperbaric group. MacPhail subsequently traveled to the United States and was treated by the Van Meter specialists for one month, beginning on November 15, 2000. MacPhail was diagnosed with multiple physical abnormalities, including significant brain and nerve damage, all linked to toxic chemical exposure and decompression sickness. Tragically, one Van Meter physician noted that MacPhail's "short, medium and long term prognosis would have been very different had he been immediately treated."

MacPhail later discovered that Oceaneering had *never* contacted any hyperbaric specialist or expert toxicologist, but rather, relied upon individuals with no diving medical experience to coordinate his treatment, even though Oceaneering actually knew of such specialists and had

used them in the past. Furthermore, Oceaneering originally provided Plaintiff with an incomplete chemical analysis of the substances he had been exposed to while diving, even though Oceaneering had possessed the complete analysis. This omission may have substantially impeded his treatment and recovery, and was, at the very least, deceitfully withheld from him during the sham negotiation of his "settlement," reached under extreme duress.

In light of these discoveries, MacPhail was moved to file this lawsuit. Oceaneering responded by filing a Motion to Dismiss for improper venue pursuant to the forum selection clause recited above. On October 17, 2001, the Court issued an Order Denying Oceaneering's Motion to Dismiss. In that Order, the Court determined that " . . . the forum selection clause at issue [is] unreasonable and therefore unenforceable because its enforcement would violate a strong public policy and because Plaintiff would thereby be deprived of his day in court. To find such a clause valid and enforceable in the precise facts of this case would amount to an unmistakable violation of our strong public policy protecting the rights of seamen as wards of the American admiralty courts, and furthermore, would effectively deprive MacPhail of his rightful day in a court of proper jurisdiction." Accordingly, the Court permitted this action to proceed here in the Southern District of Texas. As such, the Parties have since continued with discovery and trial preparation.

Around January 1, 2002, MacPhail's lead counsel, Joseph W. Walker, sent a letter to counsel for Oceaneering advising Oceaneering that MacPhail was going to travel to the United States in mid-January 2002 for further treatment and independent medical examinations ("IMEs").

The IMEs were scheduled or [sic] around February 1, 2002. The letter suggested that the Parties schedule depositions during MacPhail's visit to the United States and inquired as to whether Oceaneering was amenable to mediating the lawsuit during that time. Oceaneering's counsel responded to Walker's letter on January 2, 2002. In its response, Oceaneering indicated its desire to arrange IMEs for MacPhail and to schedule his deposition while he was present in the United States.

On January 9, 2002, just days before MacPhail was scheduled to depart for the United States, Oceaneering, Oceaneering International Party Limited and Oceaneering Australia Party Limited filed a Writ of Summons in the Supreme Court of Australia seeking specific performance of the Release. The Writ commanded MacPhail to make an appearance in the Australian forum within ten days. Consequently, MacPhail filed the instant Motion to Enjoin on January 28, 2002. In his Motion, MacPhail contends that Oceaneering filed the Australian lawsuit to "effectively circumscrib[e] this Court's jurisdiction, and once again, interfer[e] with Plaintiff's medical treatment."

II.

Federal district courts have the power to issue antisuit injunctions that enjoin persons over which they have *in personam* jurisdiction from prosecuting foreign suits. *See Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 626 (5th Cir.1996) ("It is well-settled among the circuit courts-including this one-which have reviewed the grant of an antisuit injunction that federal courts have the power to enjoin persons subject to their jurisdiction from prosecuting foreign suits."); *Gau Shan Co., Ltd. v. Bankers Trust*

Co., 956 F.2d 1349, 1352 (6th Cir.1992) ("It is well-settled that American courts have the power to control persons subject to their jurisdiction to the extent of forbidding them to sue in foreign jurisdictions."); *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 431 (7th Cir.1993) ("Courts of equity have long issued injunctions against the use of litigation, including litigation in foreign courts, not to obtain a decision on the merits but to harass a party."). The Fifth Circuit, along with the Seventh and Ninth Circuits, follows the "liberal approach" to anti-suit injunctions. *See Younis Brothers & Co., Inc. v. CIGNA Worldwide Ins. Co.*, 167 F.Supp.2d 743, 745-46 (E.D.Pa.2001) (comparing the "liberal approach" adopted by the Fifth, Seventh and Ninth Circuits with the "restrictive approach" followed by the D.C., Second and Sixth Circuits); *General Elec. Co. v. Deutz AG*, 129 F.Supp.2d 776, 783 (W.D.Pa.2000) (same). This "liberal approach" to anti-suit injunctions places minimal importance on international comity and holds that a court may enjoin a foreign proceeding if that parallel proceeding is vexatious and duplicative. *See Kaepa*, 76 F.3d at 626 (explaining that "the need to prevent vexatious and oppressive litigation" is of paramount importance when considering anti-suit injunctions and declining to "require a district court to genuflect before a vague and omnipotent notion of comity every time that it must decide whether to enjoin a foreign action."); *see also Bethell v. Peace*, 441 F.2d 495, 498 (5th Cir.1971).

A district court does not abuse its discretion by issuing an antisuit injunction if the court initially determines "that allowing simultaneous prosecution of the same action in a foreign forum thousands of miles away would result in inequitable hardship and tend to frustrate and delay the speedy and efficient determination of the cause."

Kaepa, 76 F.3d at 627 (citations omitted). Put another way, if "prosecution of the foreign action would entail 'an absurd duplication of effort' and would result in unwarranted inconvenience, expense and vexation," a district court is free to enjoin a party from taking any further steps towards prosecuting the foreign action. *Id.* (citing *Allendale,* 10 F.3d at 430-31). In the past, courts have deemed anti-suit injunctions against foreign litigation appropriate where foreign litigation would (1) frustrate a public policy of the forum issuing the injunction; (2) be vexatious or oppressive; (3) threaten the court's *in rem* or *quasi in rem* jurisdiction; or (4) prejudice other equitable considerations. *See In re Unterweser Reederei Gmbh,* 428 F.2d 888, 896 (5th Cir.1970), *aff'd on rehearing en banc,* 446 F.2d 907 (1971), *rev'd on other grounds sub nom. M/S Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 512 (1972).

The Fifth Circuit's most recent discussion of propriety of an anti-suit injunction is found in its *Kaepa* decision. That case involved a distribution agreement between a U.S. company (Kaepa) and a Japanese entity (Achilles) providing that Achilles would market Kaepa's product (athletic shoes) in Japan. *See id.* at 625. After deciding that Achilles had breached the agreement, Kaepa sued Achilles in Texas state court. *See id.* at 626. Achilles subsequently removed the action to federal court and discovery commenced. *Id.* When Achilles later brought suit against Kaepa in a Japanese court asserting similar claims, Kaepa asked the district court to enjoin Achilles's Japanese lawsuit. *Id.* The district court complied with Kaepa's request and issued the injunction. *Id.*

On appeal, Achilles argued that the lower court overlooked comity concerns in granting the injunction. *Id.*

The Fifth Circuit rejected Achilles's contention and concluded that the lower court's decision in no way "trampled on notions of international comity" because "no public international issue is implicated by the case: Achilles is a private party engaged in a contractual dispute with another private party. Second, the dispute has been long and firmly ensconced within the confines of the United States judicial system: Achilles consented to jurisdiction in Texas, stipulated that Texas law and the English language would govern any dispute; appeared in an action brought in Texas; removed that action to federal court; engaged in extensive discovery pursuant to the directives of a federal court; and only then, with the federal action moving steadily toward trial, brought identical claims in Japan." *Id.* at 627. Furthermore, the Court emphasized that "Achilles's belated ploy of filing as putative plaintiff in Japan the very same claims against Kaepa that Kaepa had filed as plaintiff against Achilles smacks of cynicism, harassment and delay." *Id.* at 627-28. Accordingly, the Fifth Circuit held that "the district court did not abuse its discretion by granting Kaepa's motion for an antisuit injunction." *Id.* at 628.

III.

Under the Fifth Circuit's reasoning in *Kaepa,* the issuance of an antisuit injunction in the instant suit would likewise fail to offend notions of international comity. First, as in *Kaepa,* no public international issue is implicated in this action. MacPhail is a private individual engaged in a dispute with a private corporation. Second, as in *Kaepa,* this action has been under the governance of the United States judicial system for a substantial time period (over nine months), the defendant is indisputably

subject to this Court's personal jurisdiction and the parties have engaged in discovery pursuant to this Court's directives as the action has moved uninterrupted towards trial. Furthermore, the defendant in this action (Oceaneering) is an *American* corporation headquartered in this District. This fact suggests that an antisuit injunction is even less controversial here than in *Kaepa* (where the party to be enjoined was Japanese). The Court finds it inconceivable that enjoining an American corporation from pursuing this particular private action in Australia would have a detrimental effect on United States-Australia relations.

Next, leaving comity considerations aside, the Court turns to the more central concerns of the Fifth Circuit's approach to antisuit injunctions, namely vexatiousness and duplicitous litigation. First, without a doubt, requiring MacPhail to litigate the validity of the Release in both Australia and the United States would result in duplicitous litigation, as well as unnecessary expense, inconvenience and nuisance. Moreover, any inconvenience to MacPhail is appreciably magnified by the fact that he is egregiously and dreadfully injured. Given MacPhail's present physical condition, any delay at all in the determination of his cause is ostensibly inequitable. Second, by seeking an Australian court order requiring specific performance of the Release, Oceaneering is making a back-door maneuver to deprive MacPhail of his day in court and to bring about the enforcement of a forum selection clause that this Court has already deemed contrary to public policy. This attempt to evade this forum's public policy and the directives contained within a prior Order of this Court must cease. Third, Oceaneering's ploy of filing suit against MacPhail in Australia just days before he was scheduled to travel to the United States for

medical treatment "smacks of cynicism, harassment and delay." *Kaepa,* 76 F.3d at 628. Indeed, against the backdrop of Oceaneering's incomprehensibly deceitful and imperious withholding of not only vital medical care, but even vital medical *information,* this crass tactic borders on the criminal. Oceaneering waited *months* before it attempted to litigate the validity of the Release in Australia and, at the time it instituted the Australian action, Oceaneering was in receipt of this Court's lengthy opinion rendering the forum selection clause contained in the Release unenforceable. Lastly, Oceaneering filed suit against MacPhail on the eve of his visit to the United States-with full knowledge that filing an Australian suit at that time would interfere with his plans to receive much needed medical treatment and evaluation by his American physicians. Such timing cannot be deemed fortuitous. Rather, it seems that Oceaneering made a calculated and cold-blooded attempt to interrupt MacPhail's journey to the United States, and to deny him any opportunity whatsoever to physically recover.

The Court cannot emphasize enough how ghastly and utterly callous Oceaneering has acted with regard to MacPhail. In fact, the evidence before the Court suggests that vexation and harassment of a severely injured plaintiff is the primary purpose, and possibly the sole purpose, of the foreign litigation at issue. Oceaneering's conduct rises to a level of harassment exponentially more abhorrent than the conduct of Achilles, which the Fifth Circuit refused to condone in *Kaepa.* As such, the Court concludes that the Fifth Circuit's "liberal approach" to antisuit injunctions, as outlined in *Kaepa,* fully supports the issuance of an injunction in this case. Accordingly, MacPhail's Motion to Enjoin is hereby GRANTED and

Oceaneering is hereby ENJOINED from further prosecuting any action against MacPhail in Australia or any other forum.[2] Furthermore, in light of the above discussion, the Court concludes that Oceaneering's Motion for Reconsideration of its Motion to Dismiss is hereby emphatically DENIED.

IT IS SO ORDERED.

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[2] The Court notes that because it does not have personal jurisdiction over Oceaneering International Party Limited (a Singaporean entity) or Oceaneering Australia Party Limited (an Australian entity), this Order in no way purports to enjoin those two entities from pursuing an Australian action against MacPhail. Rather, this Order pertains solely to Oceaneering.

170 F.Supp.2d 718

United States District Court,
S.D. Texas,
Galveston Division.

Alistair J. MACPHAIL
Plaintiff,
v.
OCEANEERING INTERNATIONAL, INC.
Defendant.

No. G-01-266.

Oct. 17, 2001.

Joseph W Walker, Franklin Mosele & Walker, Houston, TX, Gary J Siller, Strasburger & Price LLP, Houston, TX, for Alistair J MacPhail, plaintiff.

James Patrick Cooney, Royston Rayzor et al, Houston, TX, for Oceaneering International, Inc., defendant.

ORDER DENYING OCEANEERING INTERNATIONAL'S RULE 12(b)(3) MOTION TO DISMISS

KENT, District Judge.

Plaintiff Alistair MacPhail ("MacPhail") brings this lawsuit pursuant to the General Maritime Law of the United States of America, the Jones Act, 46 U.S.C.App. § 688, and the state laws of Texas. Plaintiff seeks monetary damages for injuries suffered in the course of his employment as a saturation diver on the dive support vessel OCEAN WINSERTOR, owned and operated by Defendant Oceaneering International, Inc. ("Oceaneering"), a large multi-national corporation headquartered in Houston, Texas. Now before this Court is Defendant's Rule

12(b)(3) Motion to Dismiss pursuant to an Australian Forum Selection Clause contained in a Deed of Release and Discharge ("Release") executed by the Parties on November 3, 1999. For the reasons articulated below, Defendant's Motion is hereby **DENIED**.

I.

Title 28, United States Code § 1406(a) instructs District Courts to dismiss or transfer a case if venue is improper where filed.[1] A party may move to dismiss an action based on improper venue pursuant to Fed.R.Civ.P. 12(b)(3). The burden of demonstrating that venue is improper and transfer is therefore warranted lies with the movant. *See Time, Inc. v. Manning,* 366 F.2d 690, 698 (5th Cir.1966); *Texas Marine & Brokerage, Inc. v. Euton,* 120 F.Supp.2d 611, 612 (E.D.Tex.2000); *Sanders v. Seal Fleet, Inc.,* 998 F.Supp. 729, 733 (E.D.Tex.1998); *Bounty-Full Entm't, Inc. v. Forever Blue Entm't Group,* 923 F.Supp. 950, 957-958 (S.D.Tex.1996).

This Court observes that the Fifth Circuit has not conclusively established that Fed.R.Civ.P. 12(b)(3) is in fact the precise procedural rule governing motions to dismiss based upon the enforcement of forum selection clauses. However, the decision reached by the Fifth Circuit in *Mitsui & Co. (USA), Inc. v. MIRA M/V,* 111 F.3d 33 (5th Cir.1997), suggests that the Fifth Circuit would indeed

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[1] Section 1406(a) reads as follows: "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any division in which it could have been brought." 28 U.S.C. § 1406(a).

adopt such a view. In that case, the District Court characterized its dismissal pursuant to a forum selection clause as a Rule 12(b)(3) motion to dismiss. *See Mitsui & Co. (USA), Inc. v. M/V MIRA,* No. CIV.A.95-4224, 1996 WL 444193, at *1 (E.D.La. Aug.7, 1996). Although the Fifth Circuit did not address the exact procedural issue upon appeal, the Court fully affirmed the District Court's decision to dismiss the lawsuit. *See Mitsui,* 111 F.3d at 37.

The Seventh, Ninth and Tenth Circuits agree that a motion to dismiss pursuant to a forum selection clause falls within the purview of Rule 12(b)(3). *See e.g., R.A. Argueta v. Banco Mexicano, S.A.,* 87 F.3d 320, 324 (9th Cir.1996) (concluding that a motion to dismiss premised upon enforcement of forum selection clause is governed by Rule 12(b)(3)); *Frietsch v. Refco, Inc.,* 56 F.3d 825, 830 (7th Cir.1995) (deciding that Rule 12(b)(3) is the proper procedural tool for a motion to dismiss based upon a forum selection clause); *Riley v. Kingsley Underwriting Agencies, Ltd.,* 969 F.2d 953, 956 (10th Cir.1992) (same). On the other hand, the First, Second and Third Circuits endorse different positions. *See Salovaara v. Jackson Nat'l Life Co.,* 246 F.3d 289, 299 (3d Cir.2001) (concluding that Rule 12(b)(6) dismissal is a permissible means for enforcing a forum selection clause); *New Moon Shipping Co. v. MAN B & W Diesel AG,* 121 F.3d 24, 28-29 (2d Cir.1997) (remarking that the burden "is analogous to that imposed on a plaintiff to prove that the federal court has subject matter jurisdiction over his suit"); *Lambert v. Kysar,* 983 F.2d 1110, 1112 n. 1 (1st Cir.1993) (noting that dismissal due to forum selection clause is a Rule 12(b)(6) motion, not a 12(b)(3) motion); *Avc Nederland B.V. v. Atrium Inv. P'ship,* 740 F.2d 148, 152-59 (2d Cir.1984) (permitting dismissal pursuant to Rule 12(b)(1)). Although the Circuit split is

evident, this Court concludes that, in light of the *Mitsui* decision, coupled with persuasive authorities from the Seventh, Ninth and Tenth Circuits, Oceaneering's Motion to Dismiss pursuant to a forum selection clause is properly characterized as a Rule 12(b)(3) motion to dismiss.

II.

Federal law governs this Court's inquiry into the enforceability of a forum selection clause. *See Haynsworth v. The Corp.*, 121 F.3d 956, 962 (5th Cir.1997). Forum selection clauses "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances." *The BREMEN v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 92 S.Ct. 1907, 1916, 32 L.Ed.2d 513 (1972). "The burden of proving unreasonableness is a heavy one, carried only by a showing that the clause results from fraud or overreaching, that it violates a strong public policy, or that enforcement of the clause deprives plaintiff of his day in court." *Mitsui*, 111 F.3d at 35 (citing *BREMEN*, 407 U.S. at 12-13, 15, 18, 92 S.Ct. at 1914-15, 1916, 1917-18), *see also Afram Carriers, Inc. v. Moeykens*, 145 F.3d 298, 301 (5th Cir.1998).

III.

In its Motion to Dismiss, Oceaneering argues that this Court may not judge the soundness of the forum selection clause in the Release by the merits of the underlying settlement agreement, because any inquiry into the merits is best left to the forum selected by the parties. As such, Oceaneering insists that the clause automatically warrants a dismissal of this action without further inquiry into the circumstances surrounding this litigation. In

response, MacPhail argues that this Court should and must examine the background facts giving rise to this lawsuit, because the relevant circumstances surrounding not the soundness of the forum selected, but the capacity of the Plaintiff to participate in that selection, or indeed in the creation of the entire Release document, preclude a finding that the forum selection clause is valid. Specifically, MacPhail argues that the clause is unenforceable because: (1) Oceaneering procured the Release, including the forum selection clause, through fraud and overreaching; (2) enforcement of the clause would violate public policy; and (3) enforcement of the clause would effectively deprive MacPhail of his day in court. After an exhaustively careful in-depth examination of the affidavits and other materials submitted by both Parties regarding this matter, this Court agrees with MacPhailthe circumstances of this lawsuit are so dire, and the alleged conduct of Oceaneering so egregious, that this Court simply must consider the clause's enforceability in light of the averments presented by MacPhail's affidavits.

The affidavits submitted by MacPhail aver the following set of facts: While working for Oceaneering on May 18, 1998, MacPhail was committed under pressure to saturation diving in the China Sea.[2] Along with three diving partners, MacPhail was "stored" at a depth of approximately 100 feet with a breathing mix of helium and oxygen. During the thirty day period that MacPhail remained in saturation, he and his diving partners undertook approximately fifteen "bell runs" in which they would

[2] Saturation diving requires a diver to spend extended periods of time under pressure before resurfacing.

descend to the bottom in a diving bell, exit the bell for several hours of work and then return to the vessel to await their next run.

As MacPhail entered the diving bell for his second bell run, he observed oil, mud and sludge coating the hoses and the inside of the bell. While on the bottom during the run, MacPhail experienced severe headaches, loss of concentration and decreased coordination. Upon returning to the bell, MacPhail felt disoriented. After the bell was returned to the vessel, MacPhail experienced headaches, loss of appetite, nausea and vomiting. MacPhail promptly and specifically reported his problems to surface management and the deck crew cleaned the interior of the bell.

Throughout the entire remainder of the saturation period, MacPhail continued to experience headaches, nausea, the loss of dental fillings and other severe and immediate medical problems. Although MacPhail repeatedly reported his troubles to management, the dive was not shut down and Oceaneering sent MacPhail on numerous subsequent dives. Later analysis of the seabed showed that the mud contained toxic levels of various metals including arsenic and mercury, cyanide, hydrogen sulfide and polychlorinated biphenyls.

When MacPhail was brought to the surface after thirty days, he was weakened, disoriented and exuding a "disgusting" odor. Clearly, he was in dire need of medical attention. MacPhail was transported first from the vessel to Hong Kong, where he received one day of medical attention, and then to Singapore, for additional treatment.

Upon returning to Australia (his residence at the time), MacPhail visited additional doctors provided by

Oceaneering, but his condition continued to worsen. Over the ensuing months, MacPhail suffered sleep loss, depression, pain in his teeth, episodes of intense anger, excruciating headaches, fainting spells and a host of other complications. MacPhail continued to make requests to Oceaneering for experts in hyperbaric medicine and toxicology, but was repeatedly told that Oceaneering was either looking for or unable to locate appropriate specialists. Ultimately (and incomprehensibly), Oceaneering failed to refer MacPhail to even one specialist experienced in diving medicine, chemical poisoning, or hyberbaric medicine.

Oceaneering appointed Cocks Macnish, an Australian law firm, to liaise with MacPhail.

Two Oceaneering employees, Overland and Leung, assured MacPhail that the Cocks Macnish lawyers were not adversarial but rather, were appointed to allocate resources and seek out the best medical help available. However, Patricia Saraceni, the Cocks Macnish solicitor handling the case, blithely responded to MacPhail's repeated requests for help by informing him that Oceaneering could not continue to help him and that the situation required closure. Furthermore, Overland and Leung repeatedly telephoned MacPhail, deprecating his problems and offering him a sum of money to "put it all behind us." Later, after Saraceni, Overland and Leung informed MacPhail that there was nothing more medically that could be done, and threatened to cut off future medical and financial assistance. Sick, frightened and intimidated, MacPhail agreed to sign the Release. MacPhail was not represented by counsel at that time.

The Release was prepared by Saraceni and executed in Western Australia on November 3, 1999. In consideration of the Release, MacPhail received $280,000.00, a commitment on the part of Oceaneering to provide MacPhail with additional training courses and an escrow fund in the amount of $25,000.00 to cover future medical expenses. The forum selection clause contained in the Release reads:

> In the event of any dispute in respect of or arising from this Deed of Release and Discharge or any matter relating thereto the parties hereby agree to submit their dispute to the exclusive jurisdiction of the District Supreme Court of Western Australia, or to the Federal Court of Australia and the parties hereby agree to submit to the exclusive jurisdiction of the said courts.

The execution of the Release was followed by the entry of a judgment in the District Court of Western Australia, Perth.

By the spring of 2000, MacPhail was a shadow of his former self. Severely depressed and in constant pain, MacPhail found himself unable to work or carry on normal relationships with others. That year, he became aware that one of his similarly situated diving partners had received helpful treatment in the United States from the Van Meter hyperbaric group. MacPhail subsequently traveled to the United States and was treated by the Van Meter specialists for one month, beginning on November 15, 2000. MacPhail was diagnosed with multiple physical abnormalities, including significant brain and nerve damage, all linked to toxic chemical exposure and decompression sickness. Tragically, one Van Meter physician noted that MacPhail's "short, medium and long term

prognosis would have been very different had he been immediately treated."

MacPhail later discovered that Oceaneering had *never* contacted any hyperbaric specialist or expert toxicologist, but rather, relied upon individuals with no diving medical experience to coordinate his treatment, even though Oceaneering actually knew of such specialists and had used them in the past. Furthermore, Oceaneering originally provided Plaintiff with an incomplete chemical analysis of the substances he had been exposed to while diving, even though Oceaneering had possessed the complete analysis. This omission may have substantially impeded his treatment and recovery. In light of these discoveries, MacPhail was moved to file this lawsuit. Oceaneering responded by filing its Motion to Dismiss for improper venue pursuant to the forum selection clause recited above.

IV.

As previously stated, a forum selection clause is unreasonable, and therefore unenforceable, in any of three circumstances: (1) the clause is the result of fraud or overreaching; (2) enforcement of the clause would violate a strong public policy; or (3) enforcement of the clause would deprive the plaintiff of his day in court.

A. *Fraud & Overreaching*

A forum selection clause is unenforceable for fraud only "if the inclusion of that clause in the contract was the product of fraud or coercion." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 n. 14, 94 S.Ct. 2449, 2456 n. 14, 41

L.Ed.2d 270 (1974). Stated differently, a court may consider a claim that a party was fraudulently induced to include a forum selection clause in an agreement, but may not entertain a claim that the entire agreement was procured by fraud.

The Fifth Circuit's analysis in *Afram Carriers, Inc. v. Moeykens,* 145 F.3d 298 (5th Cir.1998), illustrates these principles. In that case, Peruvian port authorities had ordered Afram to fumigate its ship. *See id.* at 300. All crew members were evacuated except for the captain, the chief engineer, and four employees of Servipro, a contract security service. Augustin Panta, a Servipro employee, died from inhalation of the toxic substance used for fumigation. Afram then entered into a settlement agreement, containing a Peruvian forum selection clause, with Panta's wife and children for $2000, in exchange for releasing all claims in Peruvian and United States courts. *See id.* At the same time, Afram instituted a limitation of liability proceeding under the Limitation of Liability Act, 46 U.S.C. §§ 181-189, in the United States District Court for the Southern District of Texas. *See Afram,* 145 F.3d at 300. When the Pantas became aware of the proceeding, they moved to intervene. However, the court denied the motion to intervene based on the forum selection clause found in the settlement agreement. *See id.*

Upon its review of the lower court's decision, the Fifth Circuit found the forum selection clause valid despite extensive evidence of fraud and overreaching.[3] The Court

[3] The Pantas presented evidence that the forum selection clause was obtained by fraud, including evidence that Afram told the Pantas that they could not sue the ship because the shipowner was American,

(Continued on following page)

commented that this was evidence of disagreement over the entire settlement, but not over the forum selection clause itself. *See id.* at 301-02. The Court further noted that while the facts were certainly dire, the settlement offer of $2000, which was made in the weeks following Panta's death and accepted by his family in exchange for waving all claims, was not procured by fraud or duress. *See id.* at 300. As such, the Court held that even if the forum selection clause was part of an illegally obtained contract, it was impermissible to draw a further inference that the clause itself was obtained via fraud or overreaching. *See id.* at 301-02.

In light of *Afram,* this Court has no choice but to reject MacPhail's fraud argument. Although MacPhail, much like the *Afram* plaintiffs, has presented multiple affidavits suggesting fraud, coercion, and manifest overreaching by Oceaneering, none of these averments support a finding that MacPhail was induced to include the forum selection clause itself in the Release. Ultimately, MacPhail's challenge is not separate and distinct from his challenge to the entire agreement. As such, this Court must decline to set aside the clause on the basis of fraud or overreaching by Oceaneering.

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that Afram failed to notify them of the Limitation of Liability proceeding and that they would have filed claims in the limitation proceeding but for the misrepresentations and failures to disclose. *See Afram Carriers, Inc. v. Moeykens,* 145 F.3d 298, 302 n. 3 (5th Cir.1998).

B. *Public Policy*

In *Afram,* after rejecting the plaintiffs' fraud argument, the Fifth Circuit turned to a discussion of public policy. *See id.* at 302. Noting that a forum selection clause is potentially unreasonable when it undermines a strong public policy of the forum, the Court undertook a determination of whether the equitable resolution afforded by the Limitation Act was a "strong" public policy that justified overcoming the forum selection clause at issue. *See id.* In doing so, the Court considered the two goals of the Limitation Act the goal of subsidizing shipowners and promoting settlement, and the goal of equitable resolution. *See id.* Ultimately, the Court concluded that "[g]iven these two competing policy concerns, it is hard to say that equitable resolution is a 'strong' public policy contravening the enforcement of a forum selection clause. The more fundamental policy underlying the Limitation Act – providing subsidization to the shipping industry – seems to diminish the strength of the equitable resolution principle, and, as a result, to prevent it from overcoming the presumption in favor of the forum selection clause's enforceability." *Id.* at 303. Thus, the Fifth Circuit rejected the Pantas' claim that the Peruvian forum selection clause was unenforceable as a violation of public policy. *See id.*

However, this lawsuit is markedly different from *Afram.* MacPhail's lawsuit, unlike *Afram,* is not a Limitation Act proceeding, but rather, a tort suit brought by an injured seaman. The competing policies behind the Limitation Act – equitable resolution and the protection of shipowners – are not implicated at all in the present action. Thus, the public policy analysis undertaken by the Fifth Circuit in *Afram* is not directly instructive to the present lawsuit. Instead, the analysis required in the

instant action invokes the policy underlying the General Maritime Law and the Jones Act. Specifically, this Court must determine whether the long-standing public policy of affording seaman, as wards of the Admiralty court, special protection from the hazards of life at sea justifies overcoming the forum selection clause in the Release.

A strong policy favoring the protection of seaman is deeply entrenched in our legal system. In *Castillo v. Spiliada Mar. Corp.,* 937 F.2d 240 (5th Cir.1991), the Fifth Circuit affirmed this policy, declaring that "[s]eaman, as wards of the court, are entitled to a careful review when a district court refuses to exercise jurisdiction over their claims. We are convinced that federal courts must remain vigilant in protecting the rights of seaman, whether foreign or domestic, in their relations with their employer." *Id.* at 247. This Court elaborated upon this perennial notion in *Sabocuhan v. Geco-Prakla,* 78 F.Supp.2d 603 (S.D.Tex.1999), stating: "These seaman often labor aboard dilapidated vessels in deplorably dangerous working conditions, and yet at considerable risk to life and limb they assist in bringing products to this country which inure to the benefit of all United States citizens. Denying an injured seaman a forum is utterly contrary to the beneficent attitude towards seamen that has for centuries characterized the Admiralty courts of the English speaking world." *Id.* at 606.

As a saturation diver, MacPhail was engaged in a highly dangerous profession that required him to remain underwater for long periods of time. He bravely faced the perils of the sea while furthering Oceaneering's interests in far- away waters, and was tragically and permanently injured as a result. Affidavits submitted by MacPhail establish that he was told by Oceaneering agents that if he

did not sign the Release, medical and financial assistance from Oceaneering, the corporation he had risked his life for, would cease. Not knowing whether his condition was going to worsen or improve. MacPhail understandably feared he couldn't risk losing future medical assistance. Therefore, while racked with pain, haunted by depression and unrepresented by counsel, MacPhail reluctantly agreed to enter into an agreement he simply lacked the capacity to fully evaluate. These averments establish that MacPhail unquestionably falls within the group of plaintiffs that our venerable and strong public policy favoring the rights of seamen was fashioned to protect. To deny MacPhail an opportunity to litigate his claims in this forum by enforcing the unreasonable forum selection clause in the Release would eviscerate the fundamental notion that the rights of seaman are worthy of special protection by the Admiralty courts.[4]

C. *A Meaningful Day in Court*

A forum selection clause is unreasonable if "trial in the chosen forum would be so difficult and inconvenient that the party would effectively be denied a meaningful

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[4] In *Sabocuhan,* this Court reluctantly held the forum selection clause at issue enforceable, even though to do so appeared contrary to public policy, because the Court was bound to do so by the Fifth Circuit's decision in *Marinechance Shipping Ltd. v. Sebastian,* 143 F.3d 216 (5th Cir.1998). *Sabocuhan* and *Marinechance* both involved forum selection clauses in employment contracts incorporating the Migrant Workers' and Overseas Filipinos' Act of 1995. However, while the opinion in *Marinechance* was squarely on point in *Sabocuhan,* the *Marinechance* decision is distinguishable from the facts of the instant action, which involves a forum selection clause in the context of a settlement agreement.

day in court." *See Argueta,* 87 F.3d at 325. MacPhail's affidavits aver that MacPhail is unable to pursue a remedy in relation to his injuries either in the Federal Courts of Australia or in the Western Australian Courts because (1) the Release was not concluded in Australia and has no connection to Australia; (2) Oceaneering has no legal presence in Australia; (3) the only connection between Oceaneering and Australia is that Oceaneering is a shareholder in Oceaneering Australia Pty Ltd., a separate legal entity which has no connection with MacPhail's injuries; (4) MacPhail is not a citizen of Australia; (5) the acts and circumstances giving rise to the injuries took place outside the jurisdiction of the Australian courts; and (6) there is no indication that it was the common intention of the Parties that the Release would be governed by Australian law. If MacPhail attempted to commence proceedings in Australia, it appears clearly to this Court that those proceedings would either be dismissed for lack of jurisdiction or, in the alternative, stayed and transferred to another forum. *Id.* at 5. In light of these averments, a real possibility exists that MacPhail will be unable to secure his rights in an Australian forum. Oceaneering has offered no evidence to the contrary.[5] As such, it would be unjust and

[5] The Court notes that in its Motion to Dismiss, both parties stipulated to jurisdiction in an Australian forum. However, MacPhail does not aver that an Australian Court would dismiss MacPhail's suit based upon a lack of personal jurisdiction. Rather, MacPhail avers that an Australian Court would dismiss the lawsuit based upon a lack of subject matter jurisdiction over the substance [sic] his claims. Thus, Oceaneering's submission to jurisdiction in Australia will not cure the potential jurisdictional obstacles that MacPhail faces in Australia. It is axiomatic that agreement of the Parties is not enough to sustain jurisdiction. MacPhail must be able to invoke Australian jurisdiction as a matter of law, which to this Court appears impossible.

unreasonable for this Court to decline jurisdiction over this case in favor of a forum selection clause choosing an implausible and unworkable forum.

In sum, this Court finds the forum selection clause at issue unreasonable and therefore unenforceable because its enforcement would violate a strong public policy and because Plaintiff would thereby be deprived of his day in court. To find such a clause valid and enforceable in the precise facts of this case would amount to an unmistakable violation of our strong public policy protecting the rights of seamen as wards of the American admiralty courts, and furthermore, would effectively deprive MacPhail of his rightful day in a court of proper jurisdiction. As such, Oceaneering's Motion to Dismiss is hereby **DENIED**.

IT IS SO ORDERED.

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302 F.3d 274

United States Court of Appeals,
Fifth Circuit.

Alistair J. MacPHAIL, Plaintiff-Appellee,
v.
OCEANEERING INTERNATIONAL, INC.,
Defendant-Appellant.

No. 02-40317.

Aug. 7, 2002.

Edward Donald Burbach, Gary J. Siller, Christine Zebley Carbo (argued), Strasburger & Price, Joseph Warren Walker (argued), Franklin, Mosele & Walker, Houston, TX, Bob F. Wright, Thomas R. Edwards, Domengeaux, Wright, Roy & Edwards, Lafayette, LA, for Plaintiff-Appellee.

James Patrick Cooney (argued), Charalambos Apostolakopoulos, Royston, Rayzor, Vickery & Williams, Houston, TX, for Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas.

Before DAVIS, DeMOSS and STEWART, Circuit Judges.

DeMOSS, Circuit Judge:

This is an appeal from an action brought by Alistair MacPhail (MacPhail) as an admiralty and maritime law claim against Oceaneering International, Inc. (Oceaneering) in the United States District Court for the Southern District of Texas. Specifically, this appeal concerns the validity of [sic] contractual forum selection clause and an

injunction preventing Oceaneering from further prosecuting any action against MacPhail in Australia.

Oceaneering presents two issues on appeal: (1) whether the district court abused its discretion when it enjoined Oceaneering from prosecuting its contract claims against MacPhail in Australia; and (2) whether the district court erred when it denied Oceaneering's Motion to Dismiss.

BACKGROUND

In May of 1998, MacPhail was working as a diver for Oceaneering onboard a dive support vessel, which was operating in the South China Sea off the Coast of China. MacPhail was employed to perform saturation diving, which required him to be "stored" at a depth of approximately 100 feet for a 30-day period.[1] While saturation diving, MacPhail breathed a mixture of helium and oxygen and undertook approximately fifteen "bell runs" in which he descended to a work area on the seabed in a diving bell, exited the bell for several hours and then returned in the bell to the vessel.

On the second bell dive, MacPhail observed oil, mud, and sludge coating the hoses and the inside of the bell.

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[1] Saturation diving is based on the principle that at certain depths and after certain amounts of time have passed, the amount of time it takes to decompress is the same. This is the diver's saturation point. Therefore, divers are placed in a tank, which places the divers under pressure and maintains them at this level of pressure to avoid decompression sickness or "the bends." The divers can then be lowered to the ocean floor through a diving bell and brought back up to the tank, with no ill effects due to decompression sickness.

MacPhail experienced severe headaches, loss of concentration, and decreased coordination. After the bell returned to the vessel, MacPhail reported his problems to surface management and the interior of the bell was cleaned by the deck crew. MacPhail continued to make his scheduled dives to the bottom but experienced headaches, loss of appetite, nausea, vomiting, and other medical problems. Later analysis of the seabed indicated the mud on the bottom contained toxic levels of arsenic, mercury, cyanide, hydrogen sulfide, and polychlorinated biphenyls.

At the end of his 30-day diving period, MacPhail was brought to the surface and released from the saturation tank. MacPhail was weak, disoriented, and needed medical attention. MacPhail was transported to Hong Kong, where he received one day of medical treatment. He was then transported to Singapore for additional treatment, after which he was returned to Australia, where he resided.[2] MacPhail saw additional doctors in Australia that were provided by Oceaneering. Over the next several months, MacPhail continued to suffer from numerous complications including sleep loss, depression, fainting spells, and headaches. During this time, MacPhail requested that experts in hyperbaric medicine and toxicology examine him. However, Oceaneering told MacPhail it was looking for, but was unable to locate appropriate specialists.

Eventually, MacPhail was told nothing more medically could be done for him; and the parties negotiated an

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[2] MacPhail's Original Complaint below notes that he is "a resident and citizen of Australia."

agreed settlement. Despite being advised by Oceaneering to obtain legal counsel, MacPhail chose not to be represented by counsel during the negotiations and when he signed the Deed of Release and Discharge ("Release").[3] The Release provided: "This Deed of Release and Discharge will be governed by and construed in accordance with the laws of Western Australia." In addition, the Release included a forum selection clause:

> In the event of any dispute in respect of or arising from this Deed of Release and Discharge or any matter relating thereto the parties hereby agree to submit their dispute to the exclusive jurisdiction of the District or Supreme Court of Western Australia, or to the Federal Court of Australia and the parties hereby agree to submit to the exclusive jurisdiction of the said Courts.

In consideration of the Release, MacPhail received $280,000; Oceaneering's commitment to provide him with additional training courses; and a $25,000 escrow fund to cover future medical expenses.[4] Additionally, on November 5, 1999, MacPhail filed suit against Oceaneering in the District Court of Western Australia, Perth; and that court entered final judgment based on the Consent Order between MacPhail and Oceaneering.[5]

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[3] In a letter dated November 2, 1999, Oceaneering's counsel advised MacPhail of the proposed settlement agreement and advised, "[w]e would recommend that you obtain legal advice as soon as possible . . . [c]ould you kindly notify us in writing when you have considered the documents and obtained legal advice on the same."

[4] The $25,000 escrow account has since been exhausted.

[5] Under Section 9(1)(a) of Australia's Admiralty Act of 1998, Federal Courts, the courts of the Territories and State courts have

(Continued on following page)

In November 2000, MacPhail traveled to the United States for treatment and was diagnosed with various physical abnormalities, including brain and nerve damage, all linked to toxic chemical exposure and decompression sickness. As a result, in September of 2001, MacPhail filed this lawsuit against Oceaneering in the Southern District of Texas, invoking the court's admiralty jurisdiction and claiming seaman status under 46 App. U.S.C. § 688. Oceaneering filed a Motion to Dismiss based on the Release and its forum selection clause.

On October 17, 2001, the district court issued an Order Denying Oceaneering's Motion to Dismiss. The district court concluded that the forum selection clause in the Release was "unreasonable and therefore unenforceable because its enforcement would violate a strong public policy and because Plaintiff would thereby be deprived of his day in court."

On January 9, 2002, Oceaneering filed a Writ of Summons in the Supreme Court of Western Australia seeking to enforce specific performance of the Release. The Writ commanded MacPhail to make an appearance in the Australian forum within 10 days. MacPhail, however, was scheduled to travel to the United States in mid-January

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jurisdiction over *in personam* maritime claims. Under Sections 4(3)(c) and (d), such maritime actions include claims for personal injury sustained as a consequence of a defect in a ship or arising out of an act or omission of the owner of the ship, or a person in possession or control of a ship, or a person for whose wrongful acts or omissions the owner of the ship is liable. *See* DAMIEN J. CREMEAN, ADMIRALTY JURISDICTION: LAW AND PRACTICE IN AUSTRALIA 37-42 (The Federation Press 1997) (discussing Sections 4(3)(c) and (d) of the Admiralty Act of 1988).

for further treatment and independent medical examinations. As a result, MacPhail filed a Motion to Enjoin his admiralty suit in the Southern District of Texas. In his motion, MacPhail argued that Oceaneering filed the Australian lawsuit to effectively circumscribe the Southern District of Texas' jurisdiction and to interfere with MacPhail's medical treatment. Oceaneering filed a Motion in Opposition and asked the district court to reconsider its previous Order denying Oceaneering's Motion to Dismiss. On February 11, 2002, the district court issued an order granting MacPhail's Motion to Enjoin and denied Oceaneering's Motion for Reconsideration. Oceaneering appeals from that order.

DISCUSSION

Issue I: Whether the district court erred when it enjoined Oceaneering from prosecuting its contract claims against MacPhail in Australia.

A. *Standard of Review*

We review the district court's decision to grant injunctive relief for abuse of discretion. *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 626 (5th Cir.1996). Under this standard, "findings of fact are upheld unless clearly erroneous, whereas legal conclusions are subject to broad review and will be reversed if incorrect." *Id.* (internal quotations omitted).

B. *Analysis*

Two factors are relevant to our comity analysis as we evaluate the district court's granting of MacPhail's Motion to Enjoin Oceaneering from prosecuting its action for specific performance in the Supreme Court of Western

Australia: whether the foreign litigation is duplicitous and vexatious litigation; and whether the injunction is necessary to protect the court's jurisdiction. *See id.* at 627.

Oceaneering's instituting an enforcement action in Australia is not duplicitous or vexatious. The two suits are not duplicitous. The suit filed by MacPhail in the Southern District of Texas, although arising out of facts contemplated in the Release, is a maritime tort claim alleging substantial injuries. The Australian lawsuit filed by Oceaneering seeks specific performance of the settlement agreement that the Australian court had already approved. Furthermore, Oceaneering's Australian lawsuit is not vexatious. If the District Court of Australia had proper jurisdiction to rule on the validity of the Release, as it already had, it is hard to imagine how seeking enforcement of that ruling would be vexatious.

We reject MacPhail's argument that the district court had to issue the injunction to protect its jurisdiction. Whether or not the District Court for the Southern District of Texas has jurisdiction of this case is a function of whether or not the Australian court had jurisdiction of the suit filed by MacPhail to secure that court's approval of his original settlement agreement and release with Oceaneering. The District Court of Western Australia established prima facie jurisdiction when it approved the Release and the settlement between Oceaneering and MacPhail long before the Southern District of Texas enjoined Oceaneering from proceeding with its lawsuit in Australia. Furthermore, nothing in the record suggests MacPhail will be barred from arguing the validity of the Release and the forum selection clause in the Australian forum. Accordingly, we find that the district court abused its discretion when it enjoined Oceaneering; and we VACATE the

district court's order granting MacPhail's Motion to Enjoin and denying Oceaneering's Motion for Reconsideration.

Issue II: Whether the district court erred when it denied Oceaneering's Motion to Dismiss MacPhail's suit in contravention of the forum selection clause.

A. Standard of Review

The enforcement of a forum selection clause is an issue of law, and we review the district court's conclusions of law *de novo*. *Afram Carriers, Inc. v. Moeykens*, 145 F.3d 298, 301 (5th Cir.1998). Further, we review *de novo* a district court's determination that a contract clause is unenforceable based on public policy grounds. *Fidelity & Deposit Co. v. Conner*, 973 F.2d 1236, 1241 (5th Cir.1992). This Court has held, however, that federal courts must presumptively uphold forum selection clauses in international transactions. *Haynsworth v. Corporation,* 121 F.3d 956, 962 (5th Cir.1997). Therefore, we review the district court's denial of Oceaneering's Motion to Dismiss *de novo*.

B. Analysis

For some of the same reasons stated above in Issue I, we conclude the district court's order denying Oceaneering's Motion to Dismiss must be vacated. However, given the posture of this case, we REMAND this proceeding to the Southern District of Texas with instructions to hold this case in abeyance pending a judgment by the Supreme Court of Western Australia concerning the negotiated settlement. If the Australian court grants Oceaneering's suit to enforce the prior settlement agreement made in that court, then the district court will dismiss this

admiralty proceeding with prejudice. If the Australian court sets aside the settlement agreement for any reason, then the district court will restore this case to its active docket and determine whether it has jurisdiction over MacPhail's claims under the theories asserted in his petition.

CONCLUSION

Having carefully reviewed the record in this case and the parties' briefing and for the above reasons, we conclude the district court abused its discretion when it enjoined Oceaneering from pursuing its action for specific performance in the Supreme Court of Western Australia. We VACATE the district court's order granting MacPhail's Motion to Enjoin and Oceaneering's Motion for Reconsideration. Further, we STAY the district court proceedings pending judgment by the Australian court. We REMAND this case to the district court for proceedings consistent with this opinion.

VACATED in part, STAYED, and REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

ALISTAIR J. MacPHAIL	§	
	§	**CA NO. G-01-266**
OCEANEERING	§	
INTERNATIONAL, INC.	§	

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

AFFIDAVIT OF David A. Youngblood, MD

On this day 27 Sept 01 appeared before me, the undersigned notary public. After I administered an oath to Dr Youngblood upon his (his, her) oath. (He/she said:

My name is David A. Youngblood I am competent to make this affidavit. The attachment marked as **Exhibit A** is a true and correct copy of my opinion written and signed on 27 Sept 01. The facts stated in my report attached as **Exhibit A** to my affidavit are within my personal knowledge and are true and correct.

David A. Youngblood, MD
/s/ David A. Youngblood MD
Name of affiant

SWORN TO and SUBSCRIBED before me by Dr Youngblood on

September 27, 2001.

Rhonda McNally
Notary Public in and for the
State of South Carolina

To whom it may concern: my compensation for this opinion is calculated at a rate of $400/hour. A total of 12.5 hours was spent, for a total compensation of $5000.00. To be billed.

/s/ Dr. David A. Youngblood, MD

David A. Youngblood, MD, MPH & TM, FACPM, FACHM

David A. Youngblood is a physician engaged in the practice of wound care, diving and hyperbaric medicine. A summary of his training and experience is as follows:

MEDICAL EDUCATION:

Medical College of South Carolina, Charleston, SC, Doctor of Medicine Degree – September 1960 – June 1964.

Louisiana State University Fellowship in Tropical Medicine, University of El Salvador, San Salvador, El Salvador – December 1963 – February 1964.

U.S. Naval School, Submarine and Radiation Medicine, U.S. Naval Base, New London, CT, – June 1966 – December 1996.

U.S. Naval School, Deep Sea Diving, Washington, D.C. – January 1967 – March 1967.

School of Public Health and Tropical Medicine, Tulane University New Orleans, LA, Master of Public Health and Tropical Medicine Degree – September 1969 – June 1970.

Fellowship in Preventive Medicine (Epidemiology) – June 1970 – July 1972.

NOAA Physicians Hyperbaric Medicine Training Program, Virginia Key, FL – November 1982.

INTERNSHIP:

Medical College Hospitals, Medical College South Carolina, Charleston, SC (Mixed medical/surgical internship) – June 1965 – May 1966.

CAREER HISTORY:

Medical Officer, American Museum of Natural History – National Geographic Society, Bolivian Expedition, Beni, Bolivia – June 1964 – November 1964.

Chief, Medical Section, Studies and Observations Group, Military Assistance Command, Republic of Vietnam – 1967.

Diving Medical Officer, Harbor Clearance Unit One, Subic Bay, Philippi8nes and Republic of Viet Nam – 1968.

Fellow in Preventive Medicine (Epidemiology), Tulane University, School of Public Health and Preventive Medicine, New Orleans, LA – 1969 – 1972. (During this period Dr. Youngblood acted as medical advisor to a number of commercial diving companies serving the offshore oil industry, as well as responding to diving emergencies in the Gulf of Mexico).

Medical Director and Director of Diving Research, Harbor Branch Foundation Laboratory, Fort Pierce, FL – 1972 – 1974. (Most of Dr. Youngblood's time during this period was spent on assignment at Duke University Medical Center, F.G. Hall Laboratory for Environmental Medicine involved in diving and hyperbaric medicine research).

Research Associate, F.G. Hall Laboratory for Environmental Medicine, Duke University Medical Center – 1973 – 1980.

Visiting Professor, Department of Physiology, University of Bergen, Bergen, Norway – 1979 – 1980.

Consultant to Norwegian Underwater Institute, Bergen, Norway 1979 – 1980.

Medical Director, Oceaneering International, Inc., Houston, TX – 1975 – June 1994.

Medical Director, Sea Tec. International, Ltd., Gloucester, MA – 1980 – 1983.

President, Hyperbaric Medical Systems, Inc., Corpus Christi, TX – 1983 – 1985.

Medical Director, Hyperbaric Medicine Unit, Memorial Medical Center Hospital, Corpus Christi, TX – 1982 – 1985.

Staff Physician, Occupational Medicine Clinic, NASA/Johnson Space Center, Houston, TX – 1985 – 1986.

Medical Officer, Hyperbaric Treatment Center, University of Hawaii School of Medicine, Honolulu, HI – 1986 – 1987.

Adjunct Associate Professor, Department of Physiology, University of Hawaii School of Medicine, Honolulu, HI – 1986 – 1993.

Staff Physician – Department of Occupational Medicine, Straub Clinic and Hospital, Inc., Honolulu, HI – 1986 – January 1993.

Director, Baromedicine Unit, Straub Clinic and Hospital, Inc., Honolulu, HI 1988 – 1993.

President, Ocean Consultants, Inc. – 1982 – Present.

Medical Director, Oxycare International, Inc. – February 1993 – Present.

Director, Hyperbaric Oxygen Department, Roper Hospital, Charleston, SC – January 1995 – Present.

PROFESSIONAL CERTIFICATION:

Board Certified in Occupational Medicine by the American Board of Preventive Medicine, November 1979.

Board Certified in Hyperbaric Medicine by the American Board of Hyperbaric Medicine 1989.

Board Certified in Undersea and Hyperbaric Medicine by the American Board of Preventive Medicine, November 1999.

Board Certified in Wound Management by the American Academy of Wound Management, April 1999.

PROFESSIONAL SOCIETY MEMBERSHIPS:

American Medical Association

Undersea and Hyperbaric Medical Society

The Wound Healing Society

American College of Hyperbaric Medicine

South Pacific Underwater Medical Society

American College of Preventive Medicine

Youngblood, D.A. and Davis, J.C. – Management of Diving Accidents, Physiology of Diving and

Compressed Air Work, Third Edition, P.B. Bennett and David Elliot, 1982, Published by Baillere and Tyndall, London.

Youngblood, D.A., Nitrox Saturation Diving, Proceedings of the Offshore Technology Conference, 1982 – Houston, Tx.

Youngblood, D.A., Hyperbaric Oxygen in the Treatment of Hansen's Disease, Hyperbaric Oxygen Review, 1984, Vol. 5, No. 4.

Youngblood, D.A., Validation of Decompression Tables: A Diving Doctor's Viewpoint, P. 59 Validation of Decompression Table, Proceeds of the Thirty Seventh Undersea and Hyperbaric Medical Society Workshop, 15 May 1987. UHMS Publication No. 74 (VAL) 1-1-88.

Barry, P.D., Vann, R.D., Youngblood, D.A., Petersen, R.E., and Bennett, P.B., Decompression from a Deep Nitrogen-Oxygen Saturation Dive – A Case Report. Undersea Biomedical Research, 1984, Vol 1, No. 4, p. 387-393.

Davis, J.C. and Youngblood, D.A. Definitive Treatment of Decompression Sickness and Arterial Gas Embolism. Weekly Update Hyperbaric and Undersea Medicine, Vol. One, No. 23, 1976.

Youngblood, D.A. and Vega, R.L., Paradoxical Pain During the Treatment of Dysbaric Osteonecrosis with Hyperbaric Oxygen. Undersea Biomedical Research, Undersea and Hyperbaric Medical Society Annual Scientific Meeting, Supplement to Vol. 18 (1991).

Youngblood, D.A. Hyperbaric Oxygen in the Treatment of Hansen's Disease, Hyperbaric Medicine Practice, Edited by Eric P. Kindwall, 1993 Best Publishing Co., Flagstaff, Arizona.

Dr. Youngblood has authored or co-authored a number of scientific and technical articles in the field of diving and hyperbaric medicine.

Publications:

Capel, Youngblood, Stewart, Note on Stress, Anxiety and Related Defenses in a Controlled Situation. Psychological Reports, 1970 27;351-355.

Youngblood, D., P.B. Bennett, R.W. Smith, W.G. Thomas and J.C. Farmer, Jr. (1975). Operational management of vestibular decompression sickness (abstract). Proceedings 6th Symposium and Underwater Physiology, San Diego, 88a, 1975.

Farmer, J.C., Jr., W.G. Thomas, D.A. Youngblood and P.B. Bennett, Inner Ear Decompression Sickness. Laryngoscope 1315-1327, September 1976.

Bennett, P.B., G.D. Blenkarn, J. Roby and D.A. Youngblood (1974) Suppression of the High Pressure Nervous Syndrome (HPNS) in human dives to 720 feet and 1,000 feet by use of Proceedings Annual Scientific Meeting of the Undersea Medical Society, Washington.

Farmer J.C., Jr., Thomas, W.G., Youngblood, D.A. and Bennett, P.B. (1976) Inner Ear Decompression Sickness. Proceedings Undersea Medical Society Scientific Meeting. 3, A50.

Bennett, P.B., Jody, J., Simon, s. [sic] and Youngblood, D.A. Optimal use of nitrogen to suppress the High Pressure Nervous Syndrome. Aviation, Space and Environmental Medicine, 46, 37-40 (1975).

Youngblood, D.A. and Wolfe, W.G., Unearthly Atmosphere: some Dangerous Aspects of Diving Gases. Diving Medicine. Ed. R.H. Strauss, 1976, published by Grune and Straton.

OCEAN CONSUTANTS [sic], INC.
P.O. BOX 1708
CHARLESTON, SC 29402

27 September 2001

Joseph W. Walker, Esq.
Franklin, Mosele & Walker, P.C.
4200 Westheimer, Suite 130
Houston, Texas 77027

Re: C.A. No. G-01-266; Alistair J. MacPhail v. Oceaneering International, Inc.; in the United States District Court for the Southern District of Texas, Galveston Division.

Dear Mr. Walker:

At your request, I have reviewed the following documents:

Deposition Book:
- C. Eric Brown taken on March 8, 2001;
- Sworn Statement of Michael J. Humphries taken on May 4, 2000;
- David M. Leung taken on March 8, 2001;
- Terrence E. Overland taken on January 9, 2001;
- Christopher R. Rogers taken on March 19, 2001; Vol. 2, taken 29 March 2001
- Michael J. Shord taken on January 8, 2001;
- J. Colin Wilson taken on March 16, 2001; and
- John L. Zachary taken on February 2, 2001.;

Medical Records/Correspondence book:
- Letter from Cocks Macnish regarding medical treatment for Mr. Shord;
- Medical Records (with medical chronology)
  - Dr. Edmund K. Kerut;
  - Our Lady of Lourdes Regional Medical Center;
  - Dr. Susan R. Andrews;
  - Heart Clinic of Louisiana;

West Jefferson Medical Center;
Dr. Thomas J. Callender;
Dr. John W. Simon;
Dr. Roger Pang;
Prof. T.M.E. Davis;
Dr. Morteza Shamsnia;
Dr. Paul G. Harch; and
Dr. Greg Deleuil.
Deed of Release of Discharge
Opinion of Jonathan Phillips Psychiatrist regarding his mental condition and its impact on his signing a settlement agreement. (with attached witness statements)
Opinion of Andrew Cartmel rehabilitation counselor
The opinion of Paul Harch dated January 20, 2001
A [sic] October 3, 2000 letter from Doctor Davis giving a full list of chemicals from Oceaneering
A 26 September 2000 letter from Dr. Greg Deleuil indicating that he was not given a complete list of chemicals by Oceaneering which he calls "disgraceful."
Oceaneering Daily Status Reports from DSV Ocean Winsetor [sic] , May & June of 1998
Oceaneering Vessel Status Reports, for May & June of 1998
Oceaneering Daily Operations Reports, DSV Ocean Winsertor, May & June of 1998
Oceaneering Consumable Requisitions, May & June of 2001
Official Deck Logs of the DSV Ocean Winsertor, May & June of 1998
Oceaneering Monthly Consolidated Dive Reports, May & June of 1998
Oceaneering Bell Logs for DSV Ocean Winsertor, May & June of 1998

Oceaneering LST Logs for DSV Ocean Winsertor, May & June of 1998
Various e-mail and FAX correspondence t/from/regarding DSV Ocean Winsertor
Oceaneering Bell Saturation Operations Dive Sheets, for May & June of 1998
Equipment Maintenance Logs from DSV Ocean Winsertor
Oceaneering Diving Operations Manual, Volumes 1& 2
Oceaneering Technical Report Manual, Revision III
Oceaneering Saturation Decompression Logs
Sat Shack Logs from DSV Ocean Winsertor
Oceaneering Gas Recovery Systems Manuals
Oceaneering Accident Reports
Various papers and articles on the topic of Hydrogen Sulfide gas
Oceaneering Safety Policy Manual (SAF-MAN-001)
Oceaneering Emergency Response Internal Contact Details (SAF-SPR-004)
Sworn Statement by Allstair [sic] J. MacPhail filed pursuant to Admiralty Rule 9h

Based upon my review, I have formed the following opinions:

The crew of the MV Ocean Winsertor were placed in harm's way when they approached WZ11-4A platform on 7 May '98, mooring to the north face of the platform. There is no record of a Job Hazard Analysis being performed prior to commencing operations in a known H2S contaminated field, and at 14:49 on 8 May, diver Gordon Chew collapsed upon exiting the dive stage. This was a close call, and it is more probable than not that diver Chew would have died or suffered permanent brain damage if he had not been treated with hyperbaric oxygen, albeit for a

different diagnosis. Supervisor Colin Wilson indicated in his Daily Status Report of 8 May '98 that he was "advised by OI corporate safety that both DCS (C. Rogers was treated earlier for a "pain only" bend) were related to H2S contamination." I agree.

In the same report, Supervisor Wilson asks, "can exposure to H2S cause problems with cumulative effects?" Despite his concern, he received no recorded response, although the Corporate Safety Officers faxed a reply on 9 May including M. Fraser, the Safety Officer for UEAM/ASIA, but is unclear whether Mike Humphries or Colin Wilson were copied. In essence, the fax advised the actions to be taken if H2S was "suspected" by the captain or diving supervisor.

Incidentally, unless there are two Mike Humphries, the organization charts show him acting as Diving Manager for Marine Oilfield Services at the same time as he was serving as Safety Officer – a potential conflict of interests in this situation and the fundamental reason that the Corporate Safety Group was originally structured to accept the ultimate responsibility of stopping dangerous operation without concern for local profit or promotion. When the first suspicion of H2S toxicity occurred this job should have been stopped until a thorough hazard analysis could be performed. If Mike Humphries was also acting as Diving Manager for the contract, the Corporate Safety Officer had the duty to "shut it down" until it could safely proceed.

On 19 May saturation diving was underway at the WZ 11-4A site. Two divers had significant symptoms of H2S poisoning, plus there was evidence that the reclaim breathing gas was being contaminated by toxic material.

Colin Wilson and Mike Humphries were concerned, but there is no record of a reply from Terry Overland in Houston until 19 May when he recommended, "rubber gloves and possible dry suits, but be careful of the diving helmet, there will be splash back in the helmet, use of a Rat Hat is recommended". A few days later, the fillings in the divers' teeth began to fall out!

By this time, 26 May, the first test results from the mud samples were back; despite being five days old, one showed an H2S content of 161.4ppm. Colin Wilson's report dated 30 May advises that, "samples from the piggable wye tested for H2X onboard read 23 ppm. But when shaken read outreached 530 ppm. A qualified medical opinion would also be appreciated!"

No evidence of a qualified medical opinion exists; they were readily available to Corporate Safety in Houston. Overland's fax of 1 June 98 to Humphries says " . . . I have a doc calling today or tomorrow, will let you know." All that he sent was a collection of internet reports, some with references to delayed neurological sequlae – the texts of which were not included! Most of these reports were no better than Oceaneering's Own Technical Report on Hydrogen Sulphide, revised in August 1985 and readily available in Houston. (Where was the Draeger Toxic Gas Detector described in the first page of the Report? It is my impression that they were in use on deck with H2S detector tubes, but not used in the saturation complex or diving bell. Apparently the Draeger tubes locked into the dive complex on 25 May were only used to test for CO2!)

On 4 June the saturation excursions began again after the Supervisor took mud samples over 6 short air dives. The highest reading was 54 ppm. The sat excursions

resumed, but both the lock-out divers and the bellman became very nauseous and went on BIBS during the recovery to the DDC. At long last, diving operations were shut down, nearly a month after the first serious exposure.

Summary:

In my opinion, the Corporate Safety Officer had the duty and responsibility to respond immediately to the initial air diving incident of 8 May '98 and request a job hazard analysis which would have revealed the deficiencies in H2S preparedness aboard the MV Ocean Winsertor. The Corporate Safety Officer clearly had access to information regarding the effects of H2S and other contaminants and was capable of contacting international experts in the fields of diving medicine, occupational medicine, and toxicology, and he had received training in the subject. Dr Desmond Gorman of the University of Auckland in New Zealand is a specialist in both Diving Medicine and Occupational Medicine and could have been called at any time; Dr Harry Oxer in Perth, Western Australia was sponsored by Oceaneering for training in Diving Medicine, and Dr Carl Edmonds of Sydney is probably the best-known Diving Medicine specialist in the world! In the United States Dr. Van Meter, Dr. Harch, or the undersigned would have been available to help. Failing to seek medical advice in a timely manner was, in my opinion, grossly negligent; claiming that it was unavailable or difficult to locate was simply fraudulent.

Having failed to act on the 8 May incident, Oceaneering's Safety Officer had a second opportunity to respond by shutting the job down on 19 May when symptoms occurred among the saturation divers and investigation pointed to

problems with contamination of the reclaimed gas as well as the bell atmosphere. With divers in saturation; captive in a potentially contaminated environment and unable to surface for several days, any action short of decompression was negligent. If competent medical advice had been obtained from an occupational medicine specialist familiar with saturation diving, immediate decompression followed by medical evaluation would have been the most probable course. Furthermore, a physician with a diving and hyperbaric medicine background would have been more likely to recognize the immediate benefits of hyperbaric oxygen and recommended treatment during decompression while still in the chamber. Several were available, as noted previously. Given the seriousness of the situation, the Corporate Safety Officer had the duty – and the authority – to halt the saturation dive and remove the divers from harm's way.

Mr. MacPhail's present condition is largely the result of inaction after an initial accidental exposure compounded by deliberate recurrent exposures to at least one identified toxin. Prompt recognition and treatment most likely would have prevented his present neurological sequelae since they were already in a hyperbaric chamber and treatment gases with high oxygen concentrations were ready at hand, but his quest for treatment was dogged by delay, obfuscation, and fraudulent misrepresentation. At this stage of his injury, Dr. Harch's low pressure oxygen treatments are appropriate and appear to be of significant benefit. They could have been initiated immediately, and continued in Singapore and Australia in Oceaneering's own chambers at little cost or inconvenience while Mr. MacPhail's medical evaluations continued with a potentially more positive outcome. In the absence of any significant treatment, Mr. MacPhail continued to

deteriorate, and, in my opinion, was suffering was severe anxiety and depression superimposed upon organic brain damage sustained by exposure to toxins and possible central nervous system decompression sickness when he signed the Deed of Release of Discharge in a state of mental incompetence.

Please be reminded that this is a preliminary opinion based upon the material reviewed. As more facts become available, these opinions may be modified accordingly, especially in regard to the possible long-term effects of other identified toxins.

Finally, as one of the founders of Oceaneering's Safety Group, it saddens me to see the years of dedication by Diving Supervisors, Area Safety Officers, and the sometime Medical Director sullied in this perverted scheme by an insurance company, their solicitors, and a degenerate corporate culture to fraudulently withhold information, treatment, and definitive care from divers injured while carrying out their duties under the captive conditions of saturation diving. Here, of all places, the employer stands "in loco parentis" and the failure to respond to the plea for help in this instance is the most egregious violation of trust and responsibility I have ever seen in the industry, with almost criminal neglect causing injury, only to be followed by a conspiracy to defraud the victims of care and reasonable compensation.

Sincerely,

/s/ David A. Youngblood, MD
David A. Youngblood, MD, MPH&TM,
FACPM (OM, DHM), FACHM

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

ALISTAIR J MACPHAIL Plaintiff	§ §	
vs	§ §	CA No G-01-266
OCEANEERING INTERNATIONAL INC Defendant	§ § §	

AFFIDAVIT

On this day **DAVID CHARLES LEASK** appeared before me, the undersigned notary public. After I administered an oath to **DAVID CHARLES LEASK**, upon his oath, he said:

1. I have been admitted as a barrister and solicitor in the Supreme Court of Western Australia and the High Court of Australia since 1992 and I am the principal of Leask & Co, Barristers & Solicitors, a law firm specialising [sic] in personal injury compensation.

2. I have been engaged by Alistair Macphail (hereinafter referred to as "Plaintiff") in Western Australia to advise as to:

   (a) whether there are grounds on which the Deed of Settlement between the Plaintiff and Oceaneering Internation [sic] Inc (hereinafter referred to as "Defendant") dated 3 November 1999 ("the Deed of Settlement") can be set aside; and if so

   (b) whether the Plaintiff is able to commence proceedings in Western Australia for personal

injuries he sustained as a consequence of exposure to toxic chemicals ("the exposure") in the South China Sea whilst in the employment of the Defendant in May or June 1988.

3. On the basis of the Plaintiff's affidavit herein sworn 24 September 2001 and from my reading of the reports and statements referred to in paragraphs 8, 9 and 10 hereunder, I understand the salient facts to be as follows:

   (a) the Plaintiff a British national who, in May 1998 aged 38 years and was an experienced commercial diver;

   (b) whilst the Defendant has a corporate presence in Singapore with its headquarters and Director of Safety in Houston, Texax [sic], United States of America, it does not and did not have one in Australia and, in particular, in Western Australia;

   (c) the Plaintiff was engaged by the Defendant on or about May 1998 to undertake commercial diving activities for the Defendant in the South China Sea ("the engagement");

   (d) the contract whereby the Plaintiff was hired has no express contractual provision relating to the jurisdiction or choice of law in respect of which any claim for compensation arising out of the engagement should be brought; nor was the contract signed or refers to any Australian company;

   (e) the Plaintiff sustained serious personal injuries ("the injuries") as a result of chemical exposure whilst engaged as a saturation diver pursuant to the contract in or about May 1998 which injuries were caused by the negligence of the Defendant;

   (f) the Defendant knew or should have known that the exposure and the injuries resulted from

breach of the duty of care that it owed to the Plaintiff;

(g) the Defendant's actions at all times after the exposure were calculated to minimise [sic], to the Plaintiff's detriment, the Defendants liabilities to the Plaintiff arising out of the exposure whilst at the same time causing or allowing the Plaintiff to believe that the Defendant was assisting the Plaintiff in facilitating the diagnosis and treatment of the injuries;

(h) the Plaintiff has been substantially compromised, both physically and psychiatrically, by the injuries and, as a consequence, has been unable and is unlikely ever to return to his former profession as a commercial diver;

(i) the Plaintiff did not receive adequate medical treatment for the injuries in spite of the fact that the Defendant knew of appropriately qualified specialist medical practitioners and consistently represented to the Plaintiff that the Defendant was attempting to locate such practitioners;

(j) in mid- to late-1999, the Plaintiff had discussions with Messrs Cocks Macnish, the law firm who had been appointed to act for the Defendant in Western Australia, which discussions culminated in the execution of the Deed of Settlement whereby the Plaintiff was to receive *inter alia* payment of US$280,000.00 together with the establishment of an escrow account in the sum of US$25,000.00 for future medical expenses;

(k) during the negotiations, and at the time that the Plaintiff executed the Deed of Settlement, he was not represented by lawyers;

(l) the Plaintiff had no appreciation of the severity of the injuries and their consequences until he obtained specialist medical treatment in late 2000.

4. It is my opinion that on the facts as referred to in the preceeding [sic] paragraph the Plaintiff has good and valid grounds upon which the Deed of Settlement may be set aside since

(a) the Plaintiff was both unrepresented and under a legal disability at the time of negotiating and executing the Deed of Release, and

(b) the Defendants conduct as referred to in the subparagraphs 3(i) and 3(k) in all the circumstances may well amount to a fraudulent concealment of the nature and consequences of the Plaintiff's condition.

5. On the facts as stated above, the Plaintiff is not able to pursue a remedy in relation to the injuries either in the Federal Court of Australia or in the Western Australian Courts since

(a) the contract was not concluded in Australia and has no connection to Australia;

(b) the Defendant has no legal presence in Western Australia (or otherwise in Australia);

(c) the only connection between the Defendant and Australia is that the Defendant is a shareholder in Oceaneering Australia Pty Ltd, a separate legal entity which has no connection with the injuries nor any liability to the Plaintiff.

(d) the Plaintiff is not a citizen of Australia;

(e) the acts and circumstances giving rise to the injuries took place outside the jurisdiction of the

Federal Court of Australia and the courts of Western Australia;

(f) there is no indication that it was the common intention of the Plaintiff and the Defendant that the contract would be governed by the laws in force in Australia or Western Australia.

6. In light of the above [sic] is no connection between the injuries and either the Commonwealth of Australia or the State of Western Australia, and the Plaintiff is therefore not able to commence an action or otherwise progress a claim in respect of the injuries against the Defendant in either the Federal Court of Australia or in the Western Australian courts since those courts do not have jurisdiction in respect of such a claim.

7. In the event that the Plaintiff attempted to commence proceedings in the Federal Court of Australia or in the Western Australian courts, those proceedings are liable to either be:

(a) struck out on the basis that those courts have no jurisdiction to entertain such a claim; alternatively,

(b) stayed and transferred to the jurisdiction where the claim should have been brought.

8. In forming the opinions expressed in this affidavit, I have read and rely on the statements of

(a) Ms Dianna Brooks dated 23 April 2001;

(b) Mr Andrew Pither dated 2001;

(c) Dr David Webb dated 30 March 2001;

(d) Dr Peter Green dated 3 April 2001;

(e) Ms Shirley Dawson dated 5 April 2001; and the medical reports of

(f) Dr Jonathan Phillips dated 7 March 2001 and 11 April 2001;

(g) Dr. Paul Harch dated 14 November 2000 and 20 January 2001;

(h) Dr Susan R Andrews dated 12 December 2000; and

(i) Dr Marteza Shamsnia dated 29 November 2000; together with

(j) the deposition of Terry Overland taken on 9 January 2001 and the telephonic sworn statement of Paul R. MacCallum taken on 31 August 2001;

(k) the deposition of David M Leung taken on 8 March 2001;

(l) the report of Richard D Walker dated 19 April 2001;

(m) the affidavit of Michael John Humphries made 4 May 2001; and

(n) the telephonic sworn statement of Paul R. MacCallum taken on 31 August 2001.

9. I have been paid the sum of AUS$1,650.00 to provide this opinion.

/s/ David Charles Leask
David Charles Leask
Name of affiant

SWORN TO and SUBSCRIBED before me by David Charles Leask on 25th September 2001

/s/ [Illegible]
Notary Public in and for the
State of Western Australia
6 Norfolk St
Fremantle
W. Australia

(LOGO)

PAUL G. HARCH, M.D.
1816 Industrial Boulevard
Harvey, Louisiana 70058
Telephone 504-348-1660 Fax 504-348-1650
E mail address: hmr@bellsouth.net
Website address: www.hyperbarics

January 20, 2001

Mr. David Leask
Leask and Company,
Barristers and Solicitors
26 Cliff Street
Fremantle, Western Australia 6160

Re: Alistair MacPhail

Dear Mr. Leask:

In response to your letter of December 1, 2000, regarding a report on the above-named patient, I'd like to submit the following answers to your questions. As you know, I evaluated and treated Mr. MacPhail beginning November 15th and ending December 15th, 2000. The patient underwent a variety of tests. My initial consultation is attached. At the end of this report I will give you a summary of any testing not answered in the specific responses to your questions and also I will detail his response to treatment. Unfortunately, I do not have the treatment records of Mr. MacPhail from Australia. I have some isolated communications to Oceaneering and to some of the experts who evaluated Mr. MacPhail. This material was from Mr. MacPhail's personal file. Responses to your questions are as follows:

1. A BRIEF HISTORY OF THE INCIDENT AND ALISTAIR'S SUBSEQUENT TREATMENT AS RELATED TO YOU BY ALISTAIR? My understanding is that

the patient was exposed to a combination of chemicals including lethal levels of hydrogen sulfide, also known as a knockdown toxin, in May of 1998 while involved in a saturation dive. I understand the patient developed a variety of symptoms at depth including loss of consciousness or near loss of consciousness, headaches, loss of amalgam fillings, extreme fatigue, sleepiness, and then a worsening of symptoms upon exit from saturation, which possibly peaked in the first month of his return to home in Australia. All of the details, as well as his chief complaints, are in the attached initial consultation of mine. I understand that he was seen by a number of physicians; however, the patient reports that he was never evaluated by a diving medicine physician or a physician that he believes had toxicology experience. He did, however, see a surgeon who diagnosed bilateral carpal tunnel syndromes and he underwent surgery. To my knowledge, the patient has had very little other treatment. I understand his primary doctor, Dr. Deleuil, told the patient that his evaluation and treatment was outside his area of expertise and recommended referral to suitable other physicians.

2. MY FINDINGS ON CLINICAL EXAM AND INTERPRETATION OF ANY RADIOLOGICAL OR OTHER FINDINGS? My findings on physical exam are detailed in the patient's consultation which, again, is attached. In brief, findings include some abnormalities about the left eye which is due to old trauma unrelated to this accident. He had some slight left lower quadrant tenderness in his abdomen which he said has been present since the accident. His rectal tone was decreased as was his ability to squeeze. His bulbocavernosus reflex was also markedly diminished. His neurological exam was abnormal, showing considerable difficulty smelling isopropyl alcohol in both nostrils. He had decreased soft touch and pinprick on

the left side of the face, decreased hearing in both ears with noxious air conduction bilaterally, worse on the right side, lateralization of his Weber to the left ear on two occasions, slightly unsteady Unterberger (rotation exam), noticeably decreased strength in both upper extremities, especially with his hands, worse on the right side, patchy decreased upper extremity and lower extremity sensory reduction, generally worse on the right side of the body in touch, pinprick, and cold sensation, generalized decrease of vibration sensation on the right side of the body, some decrease of vibration sensation as you proceeded distally in both upper and lower extremities, abnormalities of position sensation in the upper and lower extremities, more so on the right side, slightly abnormal tandem gait, unsteady Romberg, asymmetry of sharpened Romberg with greater instability on the left foot forward, asymmetry of foot tapping with abnormality on the right side, and intention tremor bilaterally.

Laboratory testing included an abnormal SPECT brain scan on a high resolution scanner showing gross heterogeneity. This was slightly improved after a single hyperbaric treatment and markedly improved at the end of the patient's hyperbaric treatment course. Quantitative somatosensory vibration and temperature testing in upper and lower extremities was abnormal and consistent with sensory neuropathies. EEG was mildly abnormal, showing borderline posterior rhythms suggesting a diffuse cerebral dysfunction. Neuropsychometric testing showed multiple abnormalities with function in the impaired range. Greatest abnormalities were in memory and attention as well as right hand speed and coordination. This was consistent with organic brain damage and depression and anxiety which had an organic basis. MRI of the brain showed minimal patchy parietal periventricular white matter changes consistent with chronic

ischemia. Echocardiogram showed a borderline left ventricular hypertrophy, mild tricuspid and mitral regurgitation but normal left ventricular function. Unfortunately, the apex of the heart was poorly visualized. EKG showed a borderline first degree AV blot. Chest x-ray showed atelectasis or scarring in both the right middle lobe and the left lingula. Cardiac stress testing was normal, consultation by Dr. Kerut, cardiologist, revealed no significant abnormalities. Evaluation by Dr. Callender, toxicologist, is unavailable but was felt to be abnormal. Evaluation by Dr. Shamsnia, neurologist, showed multiple electrical abnormalities and a diagnosis of upper and lower extremity peripheral neuropathies as well as bilateral carpal tunnel syndromes. A sleep apnea study was performed which showed moderate obstructive sleep apnea. There was moderate improvement with continuous positive airway pressure treatment. According to Dr. Callender by verbal report, this is consistent with an upper airway injury from, most likely, hydrogen sulfide. Nerve conduction velocities of the lower extremities were performed and found to be normal. In the upper extremities they were abnormal, showing abnormal sensory latencies and borderline to low amplitudes. This was consistent with upper extremity sensory neuropathies and bilateral carpal tunnel syndromes. Somatosensory evoked potentials of the median nerve were normal bilaterally, however, dermatomal somatosensory evoked potentials were normal. The posterior tibial somatosensory evoked potentials were also normal; however, the dermatomal somatosensory evoked potentials in the lower extremities were abnormal and consistent with 1.5 radiculopathics. I don't know if this last finding can be attributed to either the toxic exposure or decompression sickness.

Psychometric testing was repealed after HBOT, but the results are not available. The implication of my interpretation of all of these findings is that the patient does not have any significant cardiac injury from either decompression sickness or toxic exposure; however, he has central nervous system damage including brain damage due to a combination of toxic brain injury and decompression sickness. The decompression sickness component, I firmly believe, is present, based on the patient's history of worsening symptoms once he exited saturation and upon his return to Australia following the airline flight from Indonesia to Australia. The white matter changes seen on MRI are unusual, but are consistent with the known pathology of brain decompression sickness. I am not sure if hydrogen sulfide can cause similar changes. He has spinal cord decompression sickness, based on some of the sensory findings but also the delayed reports, secondary to the patient's embarrassment, of urinary and sexual problems and the findings of markedly decreased anal tone and spinal reflexes. In addition, the patient has distal proprioception and vibration problems which are often found due to posterior column decompressiion sickness of the spinal cord. The patient also has bilateral upper and lower extremity sensory neuropathies which, according to the verbal report of Dr. Shamsnia, the neurologist, is consistent with a toxic injury. It should be noted that peripheral neuropathies in diving medicine are felt to be extremely rare; however, over the course of the past fifteen years of diving medicine experience, I have seen approximately ten cases of acute carpal tunnel syndrome in the setting of decompression sickness. These occurred in divers who were completely asymptomatic prior to the accident. The fact that now two of these divers on the same dive have had the same problem suggests the decompression sickness component, although toxic injury could still possibly be involved in

this setting. Overt carpal tunnel syndrome post diving is consistent with a decompression accident and the accompanying pathophysiology in that subclinical compression of the median nerve would predispose the patient to altered gas exchange. In diving medicine it's usually much easier to get gas into a tissue than it is to off-gas the tissue. As such, inert gas separation within myelin or other structures of the nerve are highly probable. In contrast, in my eighteen-year experience of emergency medicine and over twenty-some thousand patient visits, I have seen possibly half a dozen cases of carpal tunnel syndrome. In the fifteen years of diving medicine and over two hundred and fifty divers, I have seen ten cases.

In addition, the patient's sleep study shows obstructive sleep apnea which is, according to toxicologist Dr. Callender, consistent with an upper airway injury due to hydrogen sulfide.

Lastly, to repeat, the patient's EEG is abnormal and consistent with a diffuse cerebral dysfunction as would be expected from either toxic chemicals or cerebral decompression sickness.

3. PROGNOSIS IN THE SHORT, MEDIUM, AND LONG TERM? Short term prognosis is excellent in that the patient has had a very dramatic improvement with a month-long course of low pressure Hyperbaric Oxygen Therapy. Symptomatically and on physical exam as well as on SPECT brain imaging, the patient has shown dramatic improvement. Medium term prognosis and long term prognosis is undefined. I suspect the current higher level of function will settle out to a new plateau level which is higher than that with which the patient presented to me. It is likely that he would respond to further hyperbaric treatment over the long term. Long term, however, his prognosis is somewhat dependent on both hyperbaric

treatment and treatment for his sleep apnea. If the sleep apnea is untreated or sporadically treated, this can have a long term impact on cardiovascular and brain function. This patient very likely will never return to any diving and I'm not sure what he will be able to do in terms of a career. It is very obvious that after two and a half years of his present injury he will have permanent long term sequelae. If we assume that the reserve capacity of his nervous system has been compromised, and I think this is an easy assumption, this has possible implications for long term mortality.

4. RECOMMENDATIONS FOR TREATMENT, LIKELIHOOD OF SUCCESS, AND APPROXIMATE COST OF SUCH TREATMENT? Recommendations for treatment would be additional courses of Hyperbaric Oxygen Therapy possibly every three months for a number of years, depending on his response. I will know upon his next return to New Orleans his degree of regression from his present symptomatology. This will somewhat give information for long term treatment. Beyond Hyperbaric Oxygen Therapy I know of no other treatment for this patient other than the continuous positive airway pressure breathing at night. The combination of these could be successful at keeping the patient at a higher level of function. The cost of the CPAP I cannot give you. Cost of hyperbaric treatment is another story. Whether you would be able to receive such treatment in Australia is very questionable. Repetitive and delayed treatment such as this is considered off-label and unusual. I've had considerable experience with this now over the past eleven years and, in fact, have pioneered this. I've presented it at four separate Undersea and Hyperbaric Medical Society meetings as well as a variety of other meetings, yet the diving medicine community refuses to offer this to patients, despite uniform

success with this here and at other facilities that have attempted this treatment. If a physician in Australia would not be willing to perform this treatment, the only possibility would be treatment here in the United States. We currently charge a hundred and fifty dollars per treatment plus occasional doctor fees. This is about to change, such that treatment would be in the two hundred to two hundred fifty dollar per treatment range.

5. HAS ALISTAIR BEEN AFFORDED THE OPPORTUNITY OF CONSULTING WITH APPROPRIATELY COMPETENT MEDICAL PRACTITIONERS? Unfortunately, I'm not knowledgeable of all of the practitioners to whom Mr. MacPhail has been referred, nor am I knowledgeable of their qualifications. If, in fact, it is true that the patient has not been seen by a qualified or experienced diving physician or toxicologist, this is extremely disturbing. The answer, I think, can only be provided by his employers but, I think, would be obvious.

6. COMMENT ON THE REASON WHY OCEANEERING SHOULD NOT HAVE REFERRED ALISTAIR TO ME IMMEDIATELY AFTER IT BECAME KNOWN THAT HE HAD SUFFERED TOXIC POISONING. ALSO INDICATE WHETHER OTHER SUITABLY QUALIFIED PRACTITIONERS KNOWN TO MYSELF IN THE INTERNATIONAL DIVING INDUSTRY WERE AVAILABLE IN JUNE OF 1998. In terms of treatment of Alistair's toxicology poisoning, Oceaneering International might not be aware of my extensive involvement in treating patients with carbon monoxide poisoning, nitrogen tetroxide, or other poisons. They are, however, very aware of my treatment of divers in both acute and chronic situations. In all of these situations I have uniformly been able to help these divers and improve their medical

conditions. Why they would not refer to me can only be answered by Oceaneering International.

As far as other qualified practitioners known to myself in the international diving industry in June of 1998, I can only state that qualified experts in toxicology are available worldwide, as are diving medicine physicians. Dr. Carl Edmonds is a known expert in Australia and, in fact, writes a textbook on diving medicine. Dr. Simon Mitchell, who was vice president of the Undersea and Hyperbaric Medical Society, and Dr. Stephen Acott are well known experts in Australia and New Zealand, as well as Dr. Des Gorman, who is internationally known and respected. All of these physicians are known to me and the international diving community and are highly regarded. In terms of toxicologists, I am not aware of the experts in the toxicology field in Australia and New Zealand; however, toxicology experts are available worldwide and certainly are available to Oceaneering International. In fact, Mr. MacPhail's colleague, whom I've also treated and who was injured on this same saturation diving project, has recently been evaluated by oceaneering's toxicology expert in Houston.

7. INDICATE WHETHER AND HOW THE PROGNOSIS FOR ALISTAIR'S CONDITIONS MAY HAVE BEEN AFFECTED HAD HE RECEIVED APPROPRIATE EARLY REFERRAL. In my opinion, the patient's short, medium, and long term prognosis would have been very different had he been immediately treated. He received partial suboptimal treatment at depth for the acute hydrogen sulfide poisoning, namely less than one ATA pure oxygen. This was delivered by report through BIBS with an 80/20 heliox mix. At 120 feet of seawater, this corresponds to a less than one atmosphere oxygen exposure. Minimum treatment is high-flow hundred percent oxygen at one atmosphere by non-rebreather mask for an extended

period of time. Dr. Lewis Goldfrank, the director of the Department of Emergency Medicine at Bellevue Hospital and Associate Professor of Clinical Medicine, New York University School of Medicine, who is the director of the New York City Poison Control Center and author of the sixth edition of Goldfrank's Toxicologic Emergencies, recommends Hyperbaric Oxygen Therapy when readily available. This could amount to further compression in saturation with a greater enriched mixture of heliox. The decompression sickness component, suggested by the patient's worsening of symptoms upon exit from saturation, should have mandated an immediate recompression. Had the patient been recompressed on site, both the decompression sickness component and likely hydrogen sulfide component would have been markedly improved. This may have even prevented the peripheral neuropathy. It is likely that a number of the patient's injuries were a secondary reperfusion injury that occurred and matured in the month or so after his exit from saturation.

This is suggested by the patient's extreme symptomatology at home with episodes of loss of consciousness, inability to function or get out of bed for protracted periods of time, and just overall ill health. It is very likely much of this would have been mitigated by early treatment.

8. HOW THE EFFECTS OF THE TOXIC POISONING HAVE ADVERSELY AFFECTED ALISTAIR'S JUDGEMENT IN RESPECT TO THE MANAGEMENT OF HIS LEGAL AFFAIRS? This is a most difficult question to answer. Unfortunately, I'm not knowledgeable of Mr. MacPhail's state of mind and cognitive faculties at the time he settled with Oceaneering. This could be better answered by his treating physicians at the time. However, we know by the SPECT brain scans, the psychometric testing, the

MRI, EEG's, physical findings, and sleep apnea study that the patient at this late date has brain damage. it was likely more severe at the time he signed his settlement since Dr. Deleuil and the patient have noted that he has had some improvement over time in his condition. How this affected his reasoning and judgement at that time is still a difficult question for me. The patient reports that he has been led to believe all along that his problems are transient and of a superficial nature. This is obviously not true.

Alistair is well aware that you are seeking this report and, in fact, I've shown him this communication. He has given me full permission to relay all of his medical information to you as well as his attorneys in Louisiana.

Hopefully this report has answered your questions sufficiently. I am most pleased to have had the opportunity to treat Mr. MacPhail. He has had a remarkable improvement and I am hopeful that this will be sustained and that he may benefit from additional treatment.

Sincerely,

/s/ Paul G. Harch, M.D.
Paul G. Harch, M.D.
Van Meter and Associates
Assistant Clinical Professor,
LSU School of Medicine, New Orleans

PGH/pr
enclosure

copy: Joe Walker

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

ALISTAIR J MACPHAIL	§	
	§	**CA NO G-01-266**
OCEANEERING INTERNATIONAL INC	§	
	§	

STATE OF NEW SOUTH WALES

~~DISTRICT OF~~

AFFIDAVIT OF **JONATHAN PHILLIPS**

On this day **JONATHAN PHILLIPS** appeared before me, the undersigned notary public. After I administered an oath to **JONATHAN PHILLIPS**, upon his oath. He said:

"My name is **JONATHAN PHILLIPS**. I am competent to make this affidavit. The attachments marked as **Exhibit A** and **B** are true and correct copies of my statement given on 7 March 2001 and 11 April 2001. The facts stated in my statement attached as **Exhibit B** to my affidavit are within my personal knowledge and are true and correct.

The attachment marked **Exhibit C** is a true and correct copy of my abbreviated *curriculum vitae*.

I have been paid the sum of AU$6,435.00 to review the Plaintiff and provide my opinions dated 7 March 2001 and 11 April 2001.

/s/ Jonathan Phillips
Name of affiant

SWORN TO and SUBSCRIBED before me by JONATHAN PHILLIPS on 25-9-01

[SEAL]

/s/ John Emmet McDermott
Notary Public in and
for the State of
New South Wales

Jonathan Phillips
MB BS, FRANZCP
Consultant Psychiatrist

Suite 45 9th Floor Hengrove Hall 193 Macquarie Street Sydney NSW 2000 Tel (02) 9221 2763 Fax (02) 9223 1183

This is the Exhibit "C" referred to in the Affidavit of Jonathan Phillips sworn before me this 25th day of September 2001.

/s/ John Emmet McDermott
John Emmet McDermott
Notary Public

ABBREVIATED CURRICULUM VITAE 2001

Jonathan Phillips is chairman elect of the Committee of Presidents of the Australian Medical Colleges and Immediate Past President of the Royal Australian and New Zealand College of Psychiatrists (RANZCP). He has been involved in numerous RNZCP activities over the years including being a member of the Committee for Examinations, Chair Committee for Training and Chair Fellowships Board of the College. Additionally he represents the RANZCP in various medico-political activities, including

the position of Chair of the Forum for Strategic Planning of Private Psychiatric Services.

Jonathan Phillips graduated in Medicine from the University of Melbourne in 1967 and was resident medical officer at St Vincents Hospital Victoria and senior resident medical officer at Royal Prince Alfred Hospital New South Wales. He trained in psychiatry at Prince Henry Hospital New South Wales, obtaining his Fellowship of the RANZCP in 1973.

Whilst working principally in private practice with a special interest in mood disorders and medicolegal psychiatry, Jonathan Phillips has been a WHO short term health consultant, has held the locum position as Head of Department of Psychiatry Repatriation General Hospital NSW, has been Chair of the psychiatric division of the Medical Services Committee of NSW and has been guest lecturer and examiner in the School of Postgraduate Studies National University of Singapore. Particularly concerned about the development of psychiatric services in East Asia, he has lectured in Vietnam, Thailand, Malaysia and Indonesia. He has also lectured in Europe.

He was awarded the Grey Ewan Medal of the RANZCP in 1973, the Graham Coupland Medal of the Royal Australian College of Surgeons in 1993 and the Arthur E Mills Medal of the Royal Australasian College of Physicians in 2000.

Jonathan Phillips is a member of the AMA and the Medicolegal Society of NSW.

There are two possible explanations for Mr. MacPhail's depressive spectrum symptoms. The simple explanation is that he suffered considerable physical incapacity as a a

[sic] consequence of exposure to toxic chemicals with a major depressive disorder occurring reactive to this. The more complex and potentially more relevant explanation is that Mr MacPhail developed a major depressive disorder as a direct consequence of exposure to toxic chemicals and effects of those chemicals on areas of the brain serving mood control. It is possible, additionally, that both processes may be important. It should be highlighted that Dr Harch and Ms Andrew both considered that Mr MacPhail's depressive disorder was organic in origin.

On balance I believe the most likely cause for Mr MacPhail's major depressive disorder will be a combination of reactive depression spectrum symptoms and direct organic effects caused by exposure to toxic chemicals. Assuming the later applied, the client will have a guarded prognosis.

The other neuropsychiatric matter of importance is strong evidence that Mr MacPhail has suffered cognitive difficulties. There are two possible causes for Mr MacPhail's cognitive difficulties which need to be considered.

The first explanation is that Mr MacPhail suffered cognitive difficulties secondary to his major depressive disorder. Depressive disorder is a common cause of temporary cognitive impairment, particularly concentration/attention and memory function. Whilst I do not rule out this mechanism in the client's case, the psychometric test results suggest a more profound and possibly more permanent cognitive impairment.

The second and more probable explanation for Mr MacPhail's cognitive difficulties will be damage to neurones due to exposure to toxic chemicals. Numerous chemicals including heavy mentals [sic] and hydrogen

sulfide have potential to damage or to kill neurons. On the balance of probabilities, Mr MacPhail's cognitive problems will predominantly be explained in this way if this is the case, then his prospect for cognitive improvement must be guarded.

Another issue to e considered is Mr MacPhail's tendency to be irritable. There will be several causes for this: First he became intensely frustrated by the failure of his employer to give proper attention to his impaired health and to organize best available information and care. He reacted to frustration with increasing irritability. Second he experiences irritability as part of a depressive disorder, this being a well accepted association. Third his irritability is due directly to the effects of toxic chemicals on his brain. The latter can not be ruled out.

Overall Mr MacPhail has suffered a very significant downturn in his health as a direct consequence to exposure to toxic chemicals beginning 18 May 1998. He has experienced multiple disabling physical symptoms (well dealt with comprehensively by the American experts), he has suffered substantive depressive spectrum symptoms, high levels of irritability and cognitive dysfunction (which is likely to be permanent). He can no longer follow his chosen career of diving and his employment prospects will be limited. He has had significant difficulties with the smooth conduct of his life since May 1998 and his enjoyment in life is much reduced. His cognitive problems are likely to cause him distress in the foreseeable future. Given strong indications that Mr MacPhail's neuropsychiatric problems are predominantly secondary to exposure to toxic chemicals, his prognosis will remain uncertain.

In answer to your questions:

A. Above.

B. Above.

C. Mr MacPhail continues to suffer from depression spectrum symptoms but they are less prominent than in the past.

D. Mr MacPhail almost certainly was suffering substantive symptoms of a major depressive disorder throughout 1999 and he had cognitive dysfunction at that time (with psychometric evidence to substantiate this matter).

It can be accepted that throughout 1999 Mr MacPhail would have been incapable of making reasoned and balanced judgement based on thoughtful consideration of his medical condition as a consequence of his then depression spectrum symptoms and his cognitive impairment.

I hold that in the circumstances Mr MacPhail would have been hindered significantly in negotiating in an appropriate manner with his employer and in reaching a proper agreement with his employer at the time of settlement.

Put simply, Mr MacPhail was not at the time in a mental state to pursue any complex task in a proper and balanced manner.

E. I believe that in greater part Mr MacPhail's various neuropsychiatric difficulties will be explained as resulting from the direct effects of toxic chemicals on his brain, this linked to exposure to toxic chemicals in the course of his employment from 18 May 1998.

F. The issue of Mr MacPhail's requirement for psychiatric treatment is complex. Assuming that his neuropsychiatric problems are predominantly due to effect of toxic chemicals on the brain, he is less likely to respond to counselling and/or anti-depressant medication than if he had a depression unrelated to chemical toxicity.

Nevertheless I suggest that Mr MacPhail undertake intensive psychological counselling with emphasis on assisting him to make the best possible adjustment to his dysphoric mood state and his likely ongoing cognitive difficulties. it would be particularly important to assist with anger management. Other issues to be addressed would be grief

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

ALISTAIR MAC PHAIL	§	
	§	**C.A. NO. G-01-266**
VS	§	
	§	
OCEANEERING	§	
INTERNATIONAL, INC.	§	

AFFIDAVIT OF MICHAEL JOHN HUMPHRIES

My name is Michael John Humphries. I'm over 21 years of age. I am a resident of Singapore. This affidavit is based on my personal knowledge of the events that transpired regarding Alistair MacPhail's injuries. I give this affidavit under oath and acknowledge that it may be used in a court of law and may be used in the United States District Court for the Southern District of Texas, Galveston Division or any other court of law and therefore is subject to the penalties of perjury.

At the time of Mr MacPhail's employment with Oceaneering International, Inc. more specifically during his saturation dive off China where he was exposed to toxic chemicals. I was the Regional Diving manager and was based in Singapore. I reported to Steve Helburn (latter Keith Noble) the Regional Vice President and General Manager, respectively, who reported to Jay Collins out of Oceaneering International, Inc's office in Houston, Texas.

It was part of my responsibility to call Mr MacPhail to various diving jobs.

Additionally, at the same time, the Director of Safety was Terry Overland who was located in Houston, Texas and was employed by Oceaneering International, Inc. Mr

Overland reported only to John Huff who was the President or CEO of Oceaneering International, Inc. The safety protocol required that the superintendent or diving supervisor and/or myself would directly report any diving conditions that could not be resolved offshore or required the medical/technical assistance to my immediate superiors and the Safety Department in Houston.

The protocal required, as in the case of the toxic poisoning that occurred to Alistair, was that Mr. Overland be notified and once notified, substantial control of the decision to continue diving would be transferred to Oceaneering International, Inc. Houston Texas. The reason for this procedure was:

1. because Oceaneering International, Inc. had world wide access to medical and diving specialist

   and

2. because Oceaneering International, Inc., Houston could acquire the medical and technical information necessary to make the determination to shut down the job without consideration of any local pressures.

In the case of Mr. MacPhail's dive, Oceaneering International Inc. was correctly contacted by Mr Wilson, the superintendent, and by myself when it appeared that the divers may be exposed to toxic chemicals. We relied on assurances from Mr Overland that medical experts were being contacted on a world wide basis to insure that it was safe to continue diving as we had had no experience in these sort of conditions prior to this incident. Unfortunately, after reviewing Mr Overland's deposition, these assurances, appear to have been misleading and false.

After Mr MacPhail's saturation dive, his medical treatment was taken out of our hands and substantial control was transferred to Mr Overland, and Mr Leung of Oceaneering International, Inc. Houston, Texas with monitoring in Australia by a group of lawyers in Australia. A review of Mr Overland's deposition in addition to what I have personally observed shows both a lack of care and deceptive conduct by Oceaneering International, Inc.

/s/ Michael John Humphries
Michael John Humphries
/s/ Michael John Humphries
25/09/

Before Me on this day personally appeared Michael John Humphries a-k-a Mike Humphries, known to me proved to me on the oath vicle [sic] driving license of Republic of Singapore ~~or through~~ ID F 1200638K (description of identity card or other document) to be the person whose name is subscribed to the foregoing instrument and acknowledged to me same as executed for the purposes and consideration therein expressed.

Given under my hand and seal of office this 25th day of September 2001

Peter Low
Notary Public in ~~for~~ the
Republic of Singapore
NOTARY PUBLIC [SEAL]
Low Peter Cuthbert
Notary No: N2001/0306
1 Apr 2001 - 31 Mar 2002
SINGAPORE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

ALISTAIR J. MacPHAIL	)	
VS.	)	C.A. NO. G-01-266
	)	(Filed Pursuant to
OCEANEERING	)	Admiralty Rule 9h)
INTERNATIONAL, INC.	)	

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TELEPHONIC SWORN STATEMENT OF
PAUL R. MacCALLUM
AUGUST 31, 2001

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* * *

[19] SWORN STATEMENT OF PAUL R. MacCALLUM

A I really can't comment on that.

Q But apparently, from reading Overland's deposition and Leung, apparently they hadn't contacted any hyperbaric specialist, right?

A Well, yeah, that's right.

Q How does that make you feel, now that you know that?

A All I can say is it doesn't surprise me, knowing the two of them.

Q How's it make you feel knowing that they were having you as their – trying to get you to, you know, placate these guys and now you're finding out that – do you feel like they deceived you?

A I wouldn't say deceived. I would say I feel as though I've been led up the garden path, which is another way of saying deceived, I suppose.

Q And then obviously you feel like you were being led up the garden path and, in turn, that the divers were being led up the garden path. Would that be a –

A Oh, I have no doubt in that particular statement. The divers were definitely strung along. There is no two ways about it.

Q Paul, what are you doing now, just out of curiosity?